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In The

Supreme Court of the United States

October Term, 1961

No. 357

JOHN SCHROEDER, et al., APPELLANTS

V.

HOMESTEAD CORPORATION, APPELLANT

Impleaded with,

MARGARET A. WILLIAMS, et al., APPELLEES

APPEAL FROM THE SUPREME COURT OF NEBRASKA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of the State of Nebraska entered on March 3, 1961, re-hearing denied, April 14, 1961, affirming a judgment of the District Court of Washington County, Nebraska, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that substantial questions are presented.

OPINION BELOW

The decree and judgment of the District Court of Washington County is not reported but may be found in the Record at pages 166 to 172. The opinion of the Supreme Court of the State of Nebraska is reported in 171 Neb. 792, 107 N.W.2d 750 (1961). The judgment of the Supreme Court of the State of Nebraska is appended to this Statement and designated Appendix A; the opinion of the Supreme Court of the State of Nebraska is appended and designated as Appendix B.

JURISDICTION

This suit was brought in the District Court of Washington County, Nebraska under the Uniform Enforcement of Foreign Judgments Act of the State of Nebraska (Sections 25-1587 et seq., Revised Statutes of the State of Nebraska, 1943). The object of the suit was to register and enforce in the State of Nebraska a judgment and decree entered by the District Court in and for Harrison County, Iowa, on December 30, 1952. The judgment and decree of the District Court of Washington County, Nebraska was entered on April 12, 1960. A notice of Appeal to the Supreme Court of the State of Nebraska was filed on June 6, 1960. The judgment of the Supreme Court of the State of Nebraska, affirming the judgment of the District Court of Washington County, was entered on March 3, 1961. The Supreme Court of the State of Nebraska denied a Motion for Rehearing on April 14, 1961. The Notice of Appeal was filed in the Supreme Court of the State of Nebraska on July 3, 1961.

The jurisdiction of this Court to review this decision by Appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the

jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case. *Williams* v. *Bruffy*, 96 U.S. 176 (1877); *Largent* v. *Texas*, 318 U.S. 418 (1943); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Rogers* v. *Alabama*, 192 U.S. 226 (1904); *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673 (1930); *Herndon* v. *Georgia*, 295 U.S. 441 1935); *Whitaker* v. *McBride*, 25 S. Ct. 430, 531, 197 U.S. 510, 49 L. Ed. 857; *Sanders* v. *Shaw*, 244 U.S. 317-320; *Home Telephone Co.* v. *Los Angeles*, 227 U.S. 228; *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441; *Postal Telegraph Co.* v. *Newport*, 247 U.S. 464, 475-6.

QUESTIONS PRESENTED

May the District Court of Washington County, Nebraska, and the Supreme Court of the State of Nebraska, refuse to register and enforce a judgment rendered by the District Court in and for Harrison County, Iowa? Did the District Court of Washington County, Nebraska, have jurisdiction on Iowa land involved in this action so as to enable it to render a valid judgment? Did the District Court of Washington County, Nebraska, and the Supreme Court of the State of Nebraska, recognize and enforce rights guaranteed by the Iowa-Nebraska Boundary Compact of 1943?

STATUTES INVOLVED

Title 28, Section 1738, United States Code; Sections 25-1587 to 25-15,104, Revised Statutes of the State of Nebraska, 1943; Chapter 130 of the Laws of Nebraska (1943); Chapter 330, United States Statutes at Large (1943); Section 22-194 of the Revised Statutes of the State of Nebraska, 1943. The relevant portions of these statutes are appended as Appendix C.

STATEMENT OF THE CASE

When Iowa and Nebraska were admitted to the Union the boundary between the states was settled as the middle of the main channel of the Missouri River. See 9 Stat. C. LXXXII, § 1; 13 Stat. C. LIX, § 2; *Nebraska* v. *Iowa*, 143 U.S. 359 (1891). The meander line of the east bank of the river was established by United States surveyors in 1851; United States surveyors meandered the west bank in 1856.

In 1943, the United States Corps of Engineers stabilized the Missouri River at a point in Harrison County, Iowa. The map on page 28 of the Record shows the location of the River's meander line of 1851, and the 1943 stabilized channel. The stabilized channel was a considerable distance east of the 1851 meander line. Between the 1851 meander line and the stabilized channel lies a large area of land. This litigation involves title to a great part of the land lying between the 1851 meander line and the 1943 stabilized channel. Title to approximately 3000 acres of fertile farm land is involved, which conservatively valued would approximate $600,000.

On June 12, 1936, Calamus Co-operative Corporation executed a mortgage upon a large area of land which lies between the 1851 meander line and the 1943 stabilized channel. The mortgagee was the Homestead Corporation, one of the appellants. The mortgage was recorded in the proper office of Harrison County, Iowa. Upon the mortgagor's default, the Homestead Corporation commenced a foreclosure action in the United States District Court, Southern District of Iowa, Western Division. On October 6, 1937, Judge Chas. A. Dewey entered a decree of foreclosure, ordering the property sold and the mortgagor's equity of redemp-

tion barred. On December 14, 1937, the mortgaged property was sold to the Homestead Corporation for $13,590.07, and the sale was confirmed by order of the United States District Court, January 26, 1938. The confirmation order provided that if redemption was not made within one year from December 14, 1937, the United States Marshall should execute a deed conveying title to the purchaser, Homestead Corporation.

On the 21st day of December, 1938, George E. Miller, Marshall for the Southern District of Iowa, executed a deed in favor of the Homestead Corporation. With the exception of a few acres in the northeastern part of Sec. 17, Township 79 N., R. 45 W. of the 5th P.M., all the land conveyed was between the 1851 meander line and the 1943 stabilized channel. This deed was recorded in the proper Harrison County, Iowa office on December 27, 1938.

For many years, extending into the 1950's Harrison County, Iowa, levied taxes upon lands located between the 1851 meander line and the 1943 stabilized channel. Record page 121. In the 1930's and 1940's taxes on some of this land became delinquent. More specifically taxes for the below-named years became delinquent on the below-described lands (all in Township 79 N., Range 45 W. of the 5th P.M., Harrison County, Iowa):

	Tax Years	Land
Group 1	1934, 1935 and 1936	SE ¼ and Government Lots 3 and 4, Section 7.
Group 2	1935, 1936 and 1937	N ½ of the NE ¼, Section 7
Group 3	1942, 1943 and 1944	Government Lots 1 and 2 and the NE ¼ of the NE ¼, Section 19.
		NW ¼ and W ½ of the NE ¼, Section 20.

All of these tax delinquent lands were located between the 1851 meander line and the stabilized channel of 1943. (See the Map on page 28 of the Record). Pursuant to the laws of the State of Iowa, the lands listed above as "Group 1" were sold for taxes on January 3, 1938, by the County Treasurer of Harrison County, Iowa. Lands designated above as "Group 2" were likewise sold for taxes on February 6, 1939. Lands designated as "Group 3" were sold for taxes on December 3, 1945.

In all three instances the County of Harrison bid in the property, all in accordance with Iowa law. Thereafter, Harrison County, Iowa, assigned the certificates of sale, and all rights possessed by the county, to John Schroeder, one of the appellants in this case. The certificates of sale for the lands designated above as "Group 1" and "Group 2" were assigned on August 17, 1945; "Group 3" on August 8, 1946.

On April 17, 1946, the County Treasurer of Harrison County, Iowa, executed deeds conveying to John Schroeder, appellant herein, title to the lands designated above as "Group 1" and "Group 2"; on March 21, 1947, the County Treasurer of Harrison County, Iowa, likewise deeded to John Schroeder the lands designated above as "Group 3." The three deeds covering the three above-described groups were recorded in Harrison County, Iowa, on April 17, 1946 ("Group 1" and "Group 2"); and March 25, 1947 ("Group 3"). By an inter vivos conveyance appellant John Schroeder conveyed to appellant Roy Harrop an undivided one-half interest in certain of the lands which were the subject of the afore-mentioned tax sales. The exact description of the lands conveyed to appellant Harrop

is immaterial to an understanding of the issues raised by this appeal.

On May 17, 1946, John Schroeder commenced an action in equity (No. 18376) in the District Court of Iowa in and for Harrison County. Parties defendant were the Homestead Corporation, Margaret A. Williams (one of the present appellees), the County Treasurer of Harrison County, Iowa, and all unknown persons claiming any interest in described lands located in section 7 (lying between the 1851 meander line and the 1943 stabilized channel). John Schroeder, alleging that he was the owner of the described lands by virtue of the afore-mentioned tax deeds, prayed that his title be quieted, that all adverse claimants be enjoined from interfering with his title or possession; that his title be cleared and that a writ of possession issue to place him in possession. On June 5, 1946, W. W. Freeland intervened, entered his appearance and answered the petition. He denied all allegations of the petition and claimed ownership of the described lands. Margaret Williams, appellee herein, was personally served on June 17, 1946, at Clay Township, Harrison County, Iowa. On July 26, 1946, W. W. Freeland filed a pleading objecting to interrogations submitted to him by appellant John Schroeder. On November 30, 1946, W. W. Freeland, intervener, filed an amended answer asking that the plaintiff's action be dismissed, alleging the Iowa District Court was ". . . . without jurisdiction of the subject matter of this action for the reason that the real estate described in plaintiff's petition as a matter of fact is situated in the State of Nebraska."

On December 5, 1946, the District Court in and for Harrison County, Iowa, issued its decree and judgment.

The court found that it had jurisdiction of the parties and the subject matter and decreed that John Schroeder was the absolute owner of the described lands (the lands were those designated above as "Group 1" and "Group 2"). It decreed that John Schroeder was entitled to sole possession of the described real estate, quieted his title and enjoined all defendants to the action, known and unknown, from claiming any interest in the lands adverse to John Schroeder. A writ of possession was issued and the Sheriff of Harrison County, Iowa, placed John Schroeder in possession.

On December 9, 1952, John Schroeder and Roy Harrop, appellants in this appeal, as co-owners of described lands lying between the 1851 meander line and the 1943 stabilized channel, filed a Petition for for Supplemental Relief based on a Declaratory Judgment in the District Court of Iowa in and for Harrison, County. This petition was filed in the same equity action (No. 18376) that appellant John Schroeder had commenced May 17, 1946. The petition alleged that the procedure (asking for a declaratory judgment in the same action) was proper under Iowa law; that notwithstanding the decree of the court (dated December 5, 1946) persons who were parties to the action, their agents, and persons claiming under them were contemptuously interferring with John Schroeder's and Roy Harrop's peaceful possession of their lands. The petition prayed the Iowa Court to decree that John Schroeder and Roy Harrop owned the described lands, to place them in possession, and to enjoin all from interferring with Schroeder's and Harrop's possession and ownership. Margaret Williams, an appellee in this appeal, filed a Motion to Dismiss (December 18, 1952) arguing that all matters had been concluded in the decree of December 5, 1946, and that the appel-

lants (John Schroeder, Roy Harrop and Homestead Corporation) could not ask for a declaratory judgment in the original action but instead must commence a new proceeding. Appellee Margaret Williams also alleged in her Motion to Dismiss that the Iowa court was without jurisdiction since the ". . . land involved in said action and in the present attempted action is . . . now located in the State of Nebraska . . . ." Margaret Williams was served on December 10, 1952, at Herman, Washington County, Nebraska; W. W. Freeland was served December 10, 1952, at Blair, Washington County, Nebraska. Record page 20.

On December 30, 1952, the District Court in and for Harrison County, Iowa, rendered a Judgment and Decree of Supplemental Relief based on Declaratory Judgment. The court decreed that the proceeding was proper under Iowa law and that the court had ". . . jurisdiction of the parties and of the subject matter." Record page 15. The court decreed that John Schroeder, Roy Harrop and the Homestead Corporation were the owners of specifically described property. With the exception of a small part of the NE ¼ of Section 17 all of the land described in the decree was located between the 1851 meander line and the stabilized channel of 1943. The exact description of the land is immaterial to an understanding of the issues on this appeal. The descriptions are contained in the decree at page 15 of the Record and may be located on the map on page 28 of the Record. The court further decreed that W. W. Freeland and anyone claiming under or through him should be enjoined from mollesting the owners of the described property.

On September 2, 1955, John Schroeder and Roy Harrop filed a petition in the District Court of Wash-

ington County, Nebraska, naming as defendants, the Homestead Corporation, Margaret A. Williams, the County Treasurer of Harrison County, Iowa, and as an intervener, W. W. Freeland. The object of the petition was to register the December 30, 1952, Decree and Judgment of Supplemental Relief based on Declaratory Judgment entered by the District Court in and for Harrison County, Iowa. The petition was based upon Nebraska's Uniform Enforcement of Foreign Judgments Act, Sections 25-1587 to 25-15,104, Revised Statutes of Nebraska, 1943. This act provides, in part, as follows:

> Section 25-1587. Terms, defined. As used in sections 25-1587 to 25-15,104:
>
> (1) "Foreign judgment" means any judgment, decree or order of a court of the United States or of any state or territory which is entitled to full faith and credit in this state.
>
> . . . .
>
> Section 25-1588. Registration of Judgment. On application made within the time allowed for bringing an action on a foreign judgment in this state, any person entitled to bring such action may have a foreign judgment registered in any court of this state having jurisdiction of such an action.
>
> . . . .
>
> Section 25-1594. Defenses. Any defense, set-off or counterclaim, which under the law of this state may be asserted by the defendant in an action on a foreign judgment may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions. Such pleadings must be filed within thirty days after personal jurisdiction is acquired over him. . . .

A duly authenticated copy of the Iowa decree of December 30, 1952, was attached to the petition. Record

page 14, and Exh. 12 of Bill of Exceptions, Sup. Ct. of Nebraska.

On January 6, 1955, appellants John Schroeder and Roy Harrop applied to the District Court of Washington County, Nebraska, for a writ of scire facias for execution on the Iowa judgment. This application also alleged that the land titles of John Schroeder, Roy Harrop and the Homestead Corporation were entitled to recognition in Nebraska under the provisions of the Iowa-Nebraska Boundary Compact of 1943. This compact established as the boundary between Nebraska and Iowa the center line of the stabilized Corps of Engineers' channel—the river course that heretofore has been referred to as the 1943 stabilized channel. The Compact further provided:

> Sec. 2. The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Iowa.
>
> Sec. 3. Titles, mortgages, and other liens good in Iowa shall be good in Nebraska as to any lands Iowa may cede to Nebraska, and any pending suits or actions concerning said lands may be prosecuted to final judgment in Iowa and such judgment shall be accorded full force and effect in Nebraska.
>
> Nebraska Laws 1943, C. 130, page 434.

Iowa passed legislation word for word like the Nebraska act, with the exception that the word "Iowa" was substituted for the word "Nebraska" whenever necessary to accord with the fact that it was the Iowa legislature acting. See Iowa Laws, 1943, C. 306, page 401. The United States Congress approved the compact on July 12, 1943. See 57 Stat. C. 220, page 494.

Notices to Show Cause why the Application for a Writ of Scire Facias should not issue were served upon

all of the appellees to this appeal. Record pages 33, 139. Appellees Ned and Irma Tyson filed a Motion to Dismiss the Application for a Writ of Scire Facias and the District Court for Washington County sustained the motion. This action was held erroneous by the Supreme Court of Nebraska in an opinion dated, June 29, 1956, 163 Neb. 43, 77 N.W.2d 678 (1956). No federal question was decided by the Nebraska Supreme Court in this opinion. The Nebraska Supreme Court judgment remanded the case for further proceedings.

All appellees filed answers to the Application for a Writ of Scire Facias contending that the December 30, 1952, judgment of the District Court in and for Harrison County, Iowa, was not entitled to registration or recognition in the State of Nebraska, arguing that the judgment was entered by a court lacking jurisdiction and thus void. Record page 46 (Cady Answer); page 51 (Williams Answer); page 56 (Byland Answer); page 62 (Freeland Answer); page 69 (Tyson Answer); page 128 (Bylund's Amended Answer). Demurrers to these Answers were interposed. Record pages 73-82. The demurrers were overruled. Record pages 82-3. A reply was filed alleging that the Iowa court which rendered the December 30, 1952, judgment had jurisdiction of the defendants and the subject matter and that no collateral attack upon the judgment should be permitted. Record page 85. Judgment was entitled to full faith and credit under Art. IV, Sec. 1, U. S. Constitution, and Iowa-Nebraska Boundary Compact of 1943.

Appellants filed Motions for Summary Judgment and for Judgment on the Pleadings. Record page 96; page 102. The court took this motion under advisement. Record page 123-4. After a trial of over 3 years dur-

ation the District Court of Washington County, Nebraska, rendered a Decree and Judgment holding generally for the appellees and against the appellants John Schroeder, Roy Harrop and Homestead Corporation. Record pages 166 to 172. The court overruled appellants' demurrers and denied their Motion for Summary Judgment and for Judgment on the Pleadings. The decree refused to recognize any rights guaranteed to appellants by the Iowa-Nebraska Boundary Compact of 1943. Record page 168. The decree refused to give full faith and credit to the December 30, 1952, Judgment and Decree of the District Court in and for Harrison County, Iowa. The decree denied the Iowa decree registration in Nebraska. Record page 169. The appellants' Application for a Writ of Scire Facias was denied. Finally, the decree quieted title to the land under a Nebraska Title in the appellees, and decreed that none of the appellants had any claim, title or interest in the land lying between the 1851, Iowa line, and the 1943 stabilized channel of the Missouri River under the Iowa-Nebraska Boundary Compact of 1943.

The District Court for Washington County, Nebraska, overruled appellants' Motion for a New Trial. Record page 176.

On June 6, 1960, appellants filed a Notice of Appeal to the Supreme Court of Nebraska. Record page 3. On the same day appellants filed a Praecipe for Bill of Exceptions (under Nebraska practice the Bill of Exceptions contains the evidence and exhibits introduced at the trial). Record pages 5 and 6. The Praecipe was served on counsel for the appellees on June 2, 1960. Record page 6. The Bill of Exceptions prepared according to the Praecipe was filed in the Su-

preme Court of Nebraska on October 4, 1960. On October 28, 1960, the appellees moved the Supreme Court of Nebraska to strike the Bill of Exceptions. Record page 189. This motion was sustained on November 10, 1960. Record page 209. Briefs were then filed by both appellants and appellees, and oral argument had. The Nebraska Supreme Court affirmed the judgment of the District Court for Washington County on March 3, 1961. Record page 210. A motion for rehearing was filed on March 22, 1961 (Record page 218); a motion to reverse, vacate and set aside the judgment of the Nebraska Supreme Court was filed on April 7, 1961 (Record page 220). The motion for rehearing was denied on April 14, 1961 (Record page 22). The notice of appeal to the Supreme Court of the United States followed. Record page 235.

STAGES IN THE PROCEEDINGS AND MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

Appellants have contended throughout this proceeding that the Decree of the District Court in and for Harrison County, Iowa is entitled to recognition and enforcement in the courts of the sister state, Nebraska. Appellants have based their argument on this point on the full faith and credit clause of the United States Constitution. Article IV, Section 1. In their Reply to the answers of appellees filed in the District Court for Washington County, appellants contended that the Iowa judgment was entitled to full faith and credit. Record pages 85 ff. Appellants raised the same contention in a Motion for Judgment on the Pleadings and for Summary Judgment. Record pages 96 to 98. The same point was raised by appellants in their Amended

Motion for Judgment on the Pleadings and for Summary Judgment. Record pages 102 to 106. The point was argued at length in appellants' Affidavit in Support of Motion for Judgment on the Pleadings and for Summary Judgment. Record page 109, at 116, 120. Appellants raised the point in two Motions for New Trials. See Record page 139 at 140 (point 6), at 142 (points 15, 16), at p. 146 (point 28); Record page 155 at 158 (points 15, 17, 18), at 162 (point 28). Appellants raised the full faith and credit contention in a Motion to Set Aside and Vacate or in the Alternative for a New Trial. Record page 173 at 174 (points 4 and 5).

The full faith and credit contention was argued fully in the briefs and oral argument before the Nebraska Supreme Court, and the point was raised in the Petition for Rehearing (Record p. 218); in the Motion to Reverse, Vacate and Set Aside the Nebraska Supreme Court's judgment (Record page 220 ff.); and in the Motion for Recall of Mandate. Record page 224. At all stages whenever the point was raised the ruling, decrees and judgments of both the District Court of Washington County and the Supreme Court of the State of Nebraska have been to the effect that the Nebraska Uniform Enforcement of Foreign Judgments Act should be construed to deny recognition and enforcement to the Decree of the District Court in and for Harrison County, Iowa. It is the appellants' contention that the Nebraska Uniform Enforcement of Foreign Judgments Act as so construed conflicts with Article IV, § 1 of the Constitution of the United States and with 28 U.S.C. § 1738.

Throughout all stages of the case appellants have contended that the Uniform Enforcement of Foreign

Judgments Act of the State of Nebraska has been construed to deny to Appellants right guaranteed to them by the terms of the Iowa-Nebraska Boundary Compact of 1943 and that the afore-mentioned state statute as construed is in conflict with the Due Process Clause of the United States Constitution (Article XIV, § 1) and with the Act of the Congress of the United States which approved and consented to the Boundary Compact. 57 Stat. C. 220, p. 494. It has also been appellants' contention throughout the proceedings that the Nebraska courts' construction of the Nebraska statute agreeing to the Boundary Compact (Neb. Laws, 1943, C. 130) conflicts with the Act of Congress approving and consenting to the Compact and with Article IV, § 1 and Article XIV, § 1 of the Constitution of the United States.

These contentions were raised at the following stages. Appellant's Petition for a Writ of Scire Facias contended that the decree of the Harrison County, Iowa court was entitled to recognition in Nebraska by virtue of the provisions of the Iowa-Nebraska Boundary Compact of 1943; and that the decree of the Iowa court established a title that was good in Iowa and entitled to full faith and credit in Nebraska, ("Sec. 3. Titles . . . good in Iowa shall be good in Nebraska as to any lands Iowa may cede to Nebraska . . ." Iowa-Nebraska Boundary Compact, Neb. Laws 1943, C. 130). The issue was raised by the appellants' reply (Record pages 85, 88). It was next raised in appellants' Motion for Judgment on the Pleadings and for Summary Judgment (Record page 97); in the Amended Motion for Judgment on the Pleadings and for Summary Judgment (Record page 103); in the Affidavit in Support of the Motion for Judgment on the Pleadings and for

Summary Judgment (Record pages 115 to 121); in the Resistance to a Motion to Dismiss (Record page 135); in the several Motions for New Trials (Record pages 140, 142, 143, 156, 158, 159, 163, 174). The contention was pressed in briefs filed in the Nebraska Supreme Court and in oral argument. It was pressed again in the Motion for Rehearing (Record page 218); in the Motions to Reverse, Vacate and Set Aside Judgment and to Recall Mandate and Affidavit in Support of these motions (Record pages 220, 224, and 227).

Appellants' also contended that the District Court of Washington County, Nebraska was without jurisdiction to quiet title to the disputed land in the appellees. Appellants' contention in this regard was based upon the restrictive provisions of Art. 1, Sec. 30, Constitution of Iowa, Article IX, Sec. 2, Constitution of Nebraska, and Section 22-194 of the Revised Statutes of Nebraska, 1943 which reads:

> Where any county is bounded by the middle of the channel of any stream or watercourse, and by reason of any change of such channel any island or tract of land shall be thrown to the other side of such bounding channel, after the original organization and establishment of the boundaries of any county, the old channel of the stream or watercourse shall, for all county and state purposes, be deemed the channel thereof.

The land whose title the District Court of Washington County quieted in appellees was outside the boundaries of Washington County under the above-quoted provisions and the court was without jurisdiction to adjudicate title to the land. In holding that the statutes of Nebraska give power to the Washington County court to adjudicate title to land outside the boundaries of the county, the Nebraska courts deprived appellants

of Iowa property without due process of law contrary to the provisions of Article XIV, § 1 of the United States Constitution. This point was raised by appellants in their Motion for a New Trial (Record, page 141). See Title 43, U.S.C., Sec. 751.

Appellants have specified with detail the procedure and the issues in this case because of the realization that the opinion rendered by the Supreme Court of the State of Nebraska in this case is not helpful in understanding the federal questions which were placed before that court for decision. The federal issues described above were properly placed before the Nebraska Supreme Court for decision; they were necessary to a determination of the case; and there is no adequate non-federal ground to support the decision against appellants. "Under those circumstances, the refusal to pass upon the federal question is just as reviewable as an express decision on the point." Stern and Gressman, Supreme Court Practice p. 85 (2d Ed. 1954).

In 1959 the Nebraska Supreme Court promulgated new rules governing the preparation, settling and filing of Bills of Exception in civil cases. These new rules (effective September 28, 1959) were ". . . designed to remove the traps and pitfalls . . . which have plagued lawyers for years." 8 Nebraska State Bar Journal 100 (No. 3, July, 1959). The new rules were promulgated pursuant to statutory authorization. Section 25-1140, Revised Statutes of Nebraska, 1943 (1959 Cum. Supp.), as amended by Nebraska Laws, c. 104, § 1 (1959), provided:

> The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of the bill of exceptions shall be regulated

and governed by rules of practice prescribed by the Supreme Court.

Pursuant to this delegation of authority the Supreme Court of Nebraska promulgated Rule 7 (c) and (d) which is as follows:

> c. *How Ordered.* The party appealing may order a bill of exceptions by filing in the office of the clerk of the district court a praecipe therefor within the time allowed for filing a notice of appeal. Unless otherwise specified therein, a praecipe requires that all of the evidence offered at the trial and all of the evidence offered at any hearing on any matter and the rulings thereon be included in the bill of exceptions. Appellant may in the alternative specify in the praecipe that less than all of such evidence be included in the bill of exceptions; however, the bill of exceptions shall be so prepared only if the written consent of all other parties be endorsed on or attached to such praecipe. The clerk of the district court shall forthwith deliver a copy of the praecipe, with attachments and endorsements thereon, to the court reporter and a copy to the Clerk of the Supreme Court.
>
> d. *Preparation and Delivery by Reporter.* Within two months after the filing of appellant's praecipe, the court reporter shall deliver to the clerk of the district court a bill of exceptions as requested in the praecipe and prepared in accordance with rules 7a and 7b. The bill of exceptions shall be certified by the court reporter as being correct and complete in accordance with the praecipe. Upon receipt of the bill of exceptions from the court reporter the clerk of the district court shall forthwith file it and notify all parties or their attorneys of record and the Clerk of the Supreme Court of the date of such filing. When filed with the clerk of the district court, such bill of excep-

tions becomes the official bill of exceptions in the case.

On June 6, 1960, appellants filed a Praecipe for a Bill of Exceptions in this case. Record page 178. Appellants designated only parts of the evidence and exhibits to be included in the Bill of Exceptions. The Praecipe was served on the Appellees on June 2, 1960. Record page 180. Appellees remained silent after this service. The Clerk of the court and the official court reporter then prepared the Bill of Exceptions in accordance with the designation in the Praecipe. The Bill as so prepared was filed in the Supreme Court of the State of Nebraska on November 4, 1960. Appellees then filed a motion to strike the bill of exceptions upon the ground that it did not contain all of the evidence and exhibits in the case. Record page 189. This motion was granted over appellants' objections. Record page 209.

It is appellants' contention that the action of the Nebraska Supreme Court in construing its rules in this manner deprived appellants of their property without due process of law contrary to Article XIV, Section 1 of the United States Constitution. At a late stage of the proceeding appellants were taken by surprise by this interpretation of Rule 7 of the Supreme Court of Nebraska and appellants were denied equal protection of the law and the right to a judicial review of the evidence and exhibits supporting their case in the Bill of Exceptions.

Appellants raised this contention in an Affidavit in Resistance to Motion to Strike the Bill of Exceptions of Appellants, Record page 203, at p. 207. It was raised in appellants' Motion for Rehearing and Brief on Rehearing (Record page 210, page 30 of the Brief,

Par. 3). It was raised in appellants' Motion to Reverse, Vacate and Set Aside Judgment and Decree (Record pages 220-1, Par. 8 and 9); in appellants' Motion for Recall of the Mandate (Record page 224, Par. 2 to 5); and in appellants' Affidavit in Support of the Motion to Reverse, Vacate and Set Aside the Judgment and Decree (Filed May 15, 1961, Record page 227, Par. 1).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The failure and refusal of the Nebraska court to give full faith and credit to the Iowa court's judgment of December 30, 1952 is in direct conflict with past decisions of the Supreme Court of the United States. The Iowa court's decree affected title to lands. The Iowa court found that it had jurisdiction over these lands by finding specifically that it had jurisdiction over the subject matter of the law suit. Appellee Margaret Williams appeared in the Iowa action and filed a Motion to Dismiss in which she denied that the Iowa court had jurisdiction over the subject matter. Appellee Margaret Williams contended in her Motion to Dismiss that the lands were located in Nebraska and that therefore the Iowa court was without jurisdiction to adjudicate matters of title pertaining to them. By denying that the Iowa court had jurisdiction over the land, Margaret Williams raised, and thereafter had full opportunity to litigate, the question of the location of the land. In short she had her day in court to present evidence concerning location of the land. Having appeared in the Iowa action with full opportunity to contend that the Iowa court lacked jurisdiction, and to present her evidence on that point, she became bound by the court's finding that it had jurisdiction over the subject matter and power to quiet title in the appel-

lants. The matter of jurisdiction of the Iowa court became res adjudicata as to Margaret Williams.

The decision of the Nebraska court refusing to hold that the Iowa judgment bound appellee Margaret Williams and to give full faith and credit to the Iowa decree is in conflict with the following decisions of the United States Supreme Court. *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (1931); *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25 (1917); *Trienies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939); *Stoll* v. *Gottlieb*, 305 U. S. 165 ( ); *Roche* v. *McDonald*, 275 U. S. 449 ( ); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940).

By failing to give full faith and credit to the Iowa decree the Nebraska court decided a federal question contrary to the above decisions of the Supreme Court of the United States and contrary to Article IV, § 1 of the United States Constitution.

The proceeding in the Iowa court which culminated in the decree and judgment of December 30, 1952, was a continuation of a lawsuit that was commenced on May 17, 1946. W. W. Freeland voluntarily intervened in the action that was commenced on May 17, 1946. W. W. Freeland entered an appearance and answered that petition. In his answer he claimed ownership of the land involved, and he also denied that the Iowa court had jurisdiction over the land which was the subject matter of the action. W. W. Freeland asked that the Iowa court dismiss the action for want of jurisdiction over the land. The Iowa court refused to do so and found specifically that it had jurisdiction. By appearing and putting in issue the question of subject

matter jurisdiction, and with a subsequent full opportunity to litigate that issue, W. W. Freeland became bound by principles of res adjudicata, and the Iowa judgment became entitled to full faith and credit in Nebraska under the decisions of the Supreme Court cited above. The jurisdiction of the Iowa court over W. W. Freeland continued down to the entrance of the December 30, 1952 Decree. See *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346 (1913).

Appellee Cady and his wife (also an appellee) claim title through W. W. Freeland. See Answer, Record page 43 at 44, and see Deed from W. W. Freeland to appellee Cady, at page 92 of the Record. Appellees Ned Tyson and Irma Tyson claim title through W. W. Freeland. See the Deed from W. W. Freeland to Ned and Irma Tyson, Record page 90. These deeds were executed in 1953 and 1954 subsequent to the decree of the Iowa court dated, December 30, 1952. An important question under the full faith and credit clause is presented as to whether that clause requires Nebraska to give full faith and credit to the Iowa decree as it affects grantees of W. W. Freeland who was bound by the Iowa decree as was Earl Bylund and Flossie Bylund; Appellants contend that this is an important question of federal constitutional law which has not been, but should be, settled by decision of the Supreme Court of the United States.

The question of the proper construction and meaning of the language of the Iowa-Nebraska Boundary Compact of 1943, and whether as construed by the Nebraska courts in this case, it conflicts with the full faith and credit and due process clauses of the United States Constitution and with the act of the Federal Congress in approving the compact are important and

substantial questions. To the appellants in this case they are important because over one-half million dollars of real estate are involved. More important though for purposes of the United States Supreme Court, these same questions carry the key to many land title disputes involving thousands of acres of land lying along the Missouri River between Iowa and Nebraska.

As this Court knows from past litigation (see *Nebraska* v. *Iowa*, 143 U.S. 359 [1892]), the Missouri River is constantly changing its course and in some instances the consequence is that the physical location of farms shift from one side of the river to the other. The 1943 Iowa-Nebraska Boundary Compact was an effort by the two states to settle the boundary. That compact established the boundary between the two states for almost the entire distance that the two states meet. Thus, thousand of acres bordering the river in both states are affected by the correct interpretation of the Compact. Efforts of the two states during 1960 and 1961 to agree upon a new Compact failed. The 1943 Compact is, therefore, the present existing legal instrument defining the boundary and the rights of property owners whose lands are shifted to the other side of the river because of natural or man-engineered forces.

During the 1961 session of the Nebraska Legislature, a resolution (Resolution 38, Nebraska Legislature, 1961) recited that since many persons in Nebraska ". . . may be called upon to defend the title to lands along the Missouri River . . ." the state surveyor was directed to make surveys that would be ". . . necessary or helpful in protecting the interests of this state or the citi-

zens thereof from the direct or indirect claims of other states to lands along the Missouri River . . ." Work has now begun under this resolution—work which will take ten years to complete. It is estimated by Nebraska State Surveyor Willis Brown that at the present time the river has shifted as much as three or four miles in places. The State Surveyor reported to the Nebraska Board of Educational Lands and Funds on August 14, 1961, that there are thirteen trouble spots along the river that have caused disputes over land titles. See Omaha World Herald, Tuesday, August 15, 1961, p. 4, col. 1; Nebraska State Journal, Tuesday, August 15, 1961, p. 20, col. 1. This instant case is one place where trouble and disputes have arisen.

A decision in this case will, therefore, be of immense assistance in settling these thirteen disputes, and the many more that most certainly will arise in the future along the Iowa-Nebraska boundary.

Appellants contend that a deed issued by a United States Marshall in 1938 pursuant to Iowa federal court mortgage foreclosure action, and tax deeds issued by an Iowa taxing authority for taxes levied long before the effective date of the 1943 Iowa-Nebraska Boundary Compact are titles which must be recognized by Nebraska under the language of the Compact: "Titles . . . good in Iowa shall be good in Nebraska . . ." (Section 3, Iowa-Nebraska Boundary Compact, 1943).

In this case the Nebraska court also held that the District Court of Washington County had jurisdiction over the land so that it could adjudicate title to that land without violating the due process clause of the United States Constitution. In construing the powers

of the Washington County court in this manner the Nebraska court decided a case in conflict with *Thompson* v. *Whitman*, 18 Wall. 457 (U.S. 1874). By virtue of Section 22-194 of the Revised Statutes of Nebraska 1943, the boundaries of Washington County did not include any of the land in controversy in this action. Accordingly, the Nebraska court was without jurisdiction over the land, and its decree deprives appellants of their property without due process of law contrary to the provisions of Article XIV, § 1 of the United States Constitution, and contrary to *Thompson* v. *Whitman*, supra.

This appeal, therefore, presents extraordinary and substantial constitutional questions which should be ruled upon by this Court.

Respectfully submitted,

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APPENDIX A.

Judgment of the Supreme Court of the State of Nebraska.

March 3, 1961

This cause coming on to be heard upon appeal from the district court of Washington county, was submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellees recover of and from appellants their costs herein expended, taxed as $; for all of which execution is hereby awarded, and that a mandate issue accordingly.

ROBERT G. SIMMONS
Chief Justice

APPENDIX B.

Opinion of the Supreme Court of the State of Nebraska.

March 3, 1961

SIMMONS, C. J.

This is an appeal from the district court for Washington County.

The notice of appeal recites that it is from decrees rendered on August 31, 1959, January 4, 1960, and April 12, 1960, and from the overruling of a motion to vacate the judgment and decree or in the alternative the overruling of a motion for a new trial. We do not find a decree of August 31, 1959, in the transcript. We do find a decree of January 4, 1960. However, this decree is shown to have been set aside by "consent of the parties" and another decree rendered April 12, 1960. It is from that decree and subsequent proceedings that the appeal is evidently taken.

The action seems to have been brought by one John Schroeder as plaintiff against Homestead Corporation, two named parties, and all persons claiming any right, title, or interest in certain described real estate "all in Harrison County, Iowa." The petition refers to one Roy M. Harrop as "co-owner," and Harrop verifies as attorney for the plaintiff. Later Harrop is carried as a plaintiff with Schroeder in the title of pleadings. The "Homestead Corporation" is carried as a defendant throughout, although in its answer referred to later herein is the recital that it is "Now American Cooperative Company, A Corporation."

We are assured in appellant's brief that this is the second appearance of this case in this court. Reference is made to Schroeder v. Homestead Corporation, 163 Neb. 43, 77 N. W. 2d 678. However we find nothing in the record before us to connect that appeal and the instant one save the similarity of names and some facts and contentions of the parties.

Schroeder, Harrop, and Homestead Corporation are recited as appellants.

On November 10, 1960, on motion of appellees the purported bill of exceptions herein was stricken by this court. That order became final. (Emphasis ours)

We here must examine the record, then, under the long-recognized rule that: In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. Brierly v. Federated Finance Co., 168 Neb. 725, 97 N. W. 2d 253.

We go then to the pleadings insofar as they relate to the decree rendered herein.

The petition was filed under the Uniform Enforcement of Foreign Judgments Act, sections 25-1587 to 25-15,104, R. R. S. 1943. The petition pleaded the existence of a judgment rendered in the district court for Harrison County, Iowa, and prayed that the judgment be registered in Washington County, Nebraska. An authenticated copy of the Iowa judgment was attached to the petition. It involved a large tract of land along the Missouri River.

Later there was filed by Schroeder and Harrop as "plaintiffs" a praecipe and application for writ of scire facias for execution on the registered judgment and decree.

A notice to show cause was issued and served on several persons. Issues were made up on that notice by parties claiming to own parts of the land in severality.

The parties so noticed answered and denied generally; several of them, with spouses, alleged ownership of the land involved by record title and adverse possession; they alleged that the land involved in the litigation had all accreted to their land throughout the years and had been in existence for more than 20 years; and some of them alleged actions to quiet title and res judicata. They further alleged that the land involved in fact existed in Washington County, Nebraska, and not in Iowa during all of the time plaintiffs were under taking to obtain possession in Iowa and that plaintiff's "foreign judgment" was void because of nonjurisdiction of the courts of Iowa over the subject matter of the action. They further alleged that the action was barred by the statute of limitations contained in Laws 1943, c. 130, § 4, p. 436, Vol. 2 A, R. R. S. 1943, appendix, page 663. Schroeder, Harrop, and Homestead Corporation replied denying generally and asserted several affirmative defenses to the allegations of the answer.

The trial court in its decree of April 12, 1960, recited that the trial proceeded for 8 separate days until "all the evidence had been presented by all of the parties"; and that the court in company with counsel had viewed the premises. It found generally against Schroeder, Harrop, and Homestead Corporation and in favor of the appellees claiming ownership. It made

several specific findings of fact in accord with its general findings.

It then decreed that the purported judgment of the district court for Harrison County, Iowa, was void. It denied registration of the judgment and the application for the writ of scire facias.

By specific reference, to parties appellees' specific lands, it held that the land was owned by the parties in fee simple, free and clear of any right, title, claim or demand of Schroeder, Harrop, and the named corporation. It cancelled any instruments of record concerning the title to the land and any rights of Schroeder, Harrop, or the corporation therein, and barred them from asserting any claim of right to possession or ownership of lands described in the decree.

Under the rule of law above announced, the judgment of the trial court is affirmed.

AFFIRMED.

APPENDIX C.

Title 28 United States Code, Section 1738.

. . .

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Iowa-Nebraska Boundary Compact of 1943, C. 130 Neb. Laws (1943).

. . .

Sec. 2. The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Iowa.

Sec. 3. Titles, mortgages, and other liens good in Iowa shall be good in Nebraska as to any lands Iowa may cede to Nebraska, and any pending suits or actions concerning said lands may be prosecuted to final judgment in Iowa and such judgment shall be accorded full force and effect in Nebraska.

Iowa-Nebraska Boundary Compact of 1943. C. 306 Iowa Laws (1943).

. . .

Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

57 Stat. C. 220. p. 494 (1943).

. . .

That the approval and consent of the Congress is hereby given to the compact effected by the Legislature of the State of Iowa entitled "An Act to establish the boundary line between Iowa and Nebraska by agreement; to cede to Nebraska and to relinquish jurisdiction over lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska; to provide that the provisions of this act become effective upon the enactment of a similar and reciprocal law by Nebraska and the approval of and the consent to the compact thereby effected by the Congress of the United States of America and to declare an emergency", approved April 15, 1943 (House File 437, Acts of the Fiftieth General Assembly), and a similar and reciprocal Act enacted by the State of Nebraska entitled "A bill for an Act to establish the boundary line between Iowa and Nebraska by agreement; to cede to Iowa and to relinquish jurisdiction over lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Iowa; to provide that the provisions of this Act shall become effective upon the approval of and the consent of the Congress of the United States of America to the compact effected by

this Act and House File 437 of the 1943 Session of the Iowa Legislature; to repeal Chapter 121, Session Laws of Nebraska, 1941; and to declare an emergency", approved May 7, 1943 (Legislative Bill 438, Fifty-sixth session of the Nebraska Legislature).

Approved July 12, 1943.

Uniform Enforcement of Foreign Judgments Act of Nebraska, Sections 25-1587 to 25-15,104, Nebraska Revised Statutes, 1943.

Section 25-1587. Terms, Defined. As used in sections 25-1587 to 25-15,104:

(1) "Foreign judgment" means any judgment, decree or order of a court of the United States or of any state or territory which is entitled to full faith and credit in this state.

. . .

Section 25-1588. Registration of Judgment. On application made within the time allowed for bringing an action on a foreign judgment in this state, any person entitled to bring such action may have a foreign judgment registered in any court of this state having jurisdiction of such an action.

. . .

Section 25-1594. Defenses. Any defense, set-off or counterclaim, which under the laws of this state may be asserted by the defendant in an action on a foreign judgment may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions. Such pleadings must be filed within thirty days after personal jurisdiction is acquired over him. . . .

Section 22-194, Revised Statutes of the State of Nebraska, 1943.

22-194. Boundary Streams; change in channel; old channel governs. Where any county is bounded by the middle of any stream or watercourse, and by reason of any change of such channel any island or tract of land shall be thrown to the other side of such bounding channel, after the original organization and establishment of the boundaries of any county, the old channel of the stream or watercourse shall, for all county and state purposes, be deemed the channel thereof.

Article IV, § 1, United States Constitution.

Full faith and credit shall be given in each state to the Public Acts, Records, and Judicial Proceedings of every other State.

Article XIV, § 1, United States Constitution.

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

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No. 3

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57.

STATES,

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Respondent.

E UNITED STATES COURT OF
SECOND CIRCUIT.

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AE ON THE MERITS.

AUNCEY NEWLIN
Amicus Curiae
14 Wall Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 357.

UNITED STATES,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY *AMICUS CURIAE* FOR A REHEARING, AND, IF GRANTED, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON THE MERITS.

The undersigned, as *amicus curiae* and in behalf of taxpayers generally, respectfully moves the Court for a rehearing of this case and, if granted, for leave to file a brief *amicus curiae* on the merits.

This motion is made for the following reasons:

I.

The decision for the Respondent will mean hardship to many thousands of taxpayers whose case, as such, was not presented to the Court.

The case of the taxpayer before the Court was a unique situation which made it advantageous to it to argue against the interest of taxpayers generally. While the Petitioner, the Government, stood to gain a certain amount from a decision in its favor, it stood to gain a great deal more from taxpayers generally by a decision against it under which countless deductions would be long delayed. Consequently, in substance, the proceeding was not an adversary proceeding.

The Government presented to the Court an argument supporting one theory favoring taxpayers generally. The Government ignored an alternative theory, also favoring taxpayers generally (see Point VI). Furthermore, it is believed a number of things, outlined below, could and should have been brought to the Court's attention, and that these things well might have resulted in a different decision.

II.

It is generally recognized that in the field of taxation questions should be answered on the basis of practical considerations and without unnecessarily producing unreasonable results. For taxpayers generally, this decision will have harsh consequences, for which there is no necessity.

Under the decision, a taxpayer who pays a disputed amount, which is deductible for Federal income tax purposes, and which is later determined to be due, is out of pocket the full amount from the date of payment but is entitled to no Federal income tax deduction until much later. Under the prior rule, he was entitled to an immediate deduction, and, assuming a Federal income tax rate of, say, 50%, he was out of pocket, net, only one-half of the disputed payment, and he had the use of the other one-half.

The effect of the decision is that taxpayers will be forced to overpay their taxes, pending resolution of the

dispute. As long as the dispute is pending it is uncertain whether the overpayment is to the City or to the Federal Government, but it is certain an overpayment has been made to one or the other, or both. Governmental authorities meanwhile have the use of money which admittedly is not due to them. No rule which requires a taxpayer to advance to governmental authorities money which, by admission, he does not owe is reasonable or fair. Yet, such is the effect of this decision.

III.

The decision will result in a number of other unreasonable practical consequences to taxpayers generally.

In a real estate certiorari proceeding, the real estate tax recovery, if any, usually is a fraction of the amount claimed (the example in the opinion assumes one-third). Under the decision, the amount disputed but found due (two-thirds) is allowed as a deduction in a year much later than the year for which it was assessed and paid, and it is allowed as a deduction in a year to the business of which it is not related. Consequently, net income (for Federal income tax purposes) of the respective fiscal periods is not fairly reflected.

Furthermore, again as indicated by the example in the opinion, it is customary, for reasons of economy, to dispose of certiorari proceedings in blocks of years (the example uses five years). Under the decision, in the example used the upheld accumulated disputed amount for five years is allowed as a deduction in one year, the year of settlement, thus distorting net income of that year, and unrealistically attributing to that one year expenses actually related to the business of a long period of prior years.

In real estate certiorari proceedings there is no escape from making a claim as large as might possibly be allowed,

while recognizing that, realistically, there is little likelihood of the total claim being allowed. (In the example in the opinion it is assumed that one-third of the claim is allowed.) Consequently, under the decision, in order for a taxpayer to have a fair chance of a reasonably satisfactory result in his real estate certiorari proceeding, he is forced to forgo a Federal income tax deduction for years in respect to an amount which has been paid and which, in all probability, he will never recover.

IV.

The decision upsets uniformly accepted reasonable tax practice followed since the Federal income tax was adopted in 1913.

Until the *Dixie Pine* and *Security Flour Mills* decisions of the Supreme Court (1944), the rule was to allow the real estate tax payment as a deduction in the year of payment, and if later there was a refund, to adjust the deduction taken in the earlier year unless an additional assessment for that year was then barred by the statute of limitations, in which case the refund was treated as income in the year of the refund. *Elliott*, 45 BTA 82 (1941).

Following *Dixie Pine*, the rule was to allow the deduction for the full amount paid in the year of payment and to treat any refund as income in the year of the refund. *Bartlett* v. *Delaney*, 173 F. 2d 535 (C. A. 1, 1949), cert. denied, 338 U. S. 817.

However, it was *always* recognized that the taxpayer was entitled to deduct *in the year of payment* at least *the amount finally determined to be due and never refunded.* The only modification that was made following *Dixie Pine* was with respect to the treatment of any amount refunded, that is, the amount finally determined *not* to be due. As noted, in the pre-*Dixie Pine* period this refunded amount

was dealt with by an adjustment in the year of payment, and in the post-*Dixie Pine* period the earlier year was not adjusted and the refund was treated as income when received.

Never, before the instant decision, was a rule applied under which the taxpayer was allowed no deduction in the year of payment for the amount ultimately found to be due. To allow no deduction in the year of payment *for this amount* is a wholly new concept and, as noted above, it is a rule which has very harsh consequences for taxpayers generally. The circumstance that for almost 50 years the rules were such as not to require such results proves that they are not required. It would seem only the most compelling reasons would warrant a change at this late date. The opinion indicates these things were not brought to the Court's attention.

V.

The decision will create doubt and confusion in the administration of the tax laws because it is not clear from the opinion (i) whether it applies to cash basis taxpayers, and (ii) whether it only applies to disputed real estate taxes paid under the circumstances represented by the record in the case.

As to cash basis taxpayers, the opinion seems to conclude that in the *Consolidated Edison* case there was no "payment" in the sense of an amount remitted in discharge of an obligation, and that the amount was a mere "deposit" in the nature of a "cash bond." If such an amount is not a payment by an accrual basis taxpayer, it is not a payment by a cash basis taxpayer. Therefore, it would seem to follow that the decision applies to cash basis taxpayers as well as to accrual basis taxpayers. However, the opinion leaves the question in doubt.

As to whether the decision applies only to disputed real estate taxes, the apparent rejection by the Court of the decision in *Chestnut Securities Co.* v. *United States* (Ct. Cl.), 62 F. Supp. 574, which involved a state income tax, indicates the decision may apply to any disputed payment otherwise deductible. If such is the case the decision will adversely affect, sooner or later, most taxpayers since in the course of any taxpayer's total experience he is likely to make an otherwise deductible payment which he does not consider he owes and which he thereafter seeks to recover.

If the decision is limited to payments under the circumstances presented by the *Consolidated Edison* case—namely, where the taxpayer, in order to dispute the local tax, is under compulsion to pay or risk seizure and sale of the property and 7% interest—the result is paradoxical. It means that if the taxpayer has no choice except to pay, his deduction is long deferred, but if he can elect either to pay and seek a refund, or to dispute without payment, he is entitled to an immediate deduction if he pays.

VI.

The decision was rendered without argument to the Court of the validity of the rule, in effect until the *Dixie Pine* decision, of adjusting the deduction taken in the year of payment in the event of a subsequent refund. This rule was followed for 30 years, that is, until the *Dixie Pine* decision. See *Bartlett* v. *Delaney, supra.* It is the rule which best reflects net income. See *Elliott, supra.*

The rule is consistent with the "all events" test since, as to the portion of the tax ultimately determined to be due, the obligation was discharged when the tax was paid.

It is submitted this rule should have been critically examined before the decision was made. In a case which

has such widespread application, and where so many taxpayers are seriously affected, every aspect should be considered.

VII.

The decision in the *Consolidated Edison* case should be reconsidered in the light of the decision of the majority of the Court in *American Automobile Association* v. *United States*, No. 288. In the AAA case the cash amount received was taxed as income when received, although services were still to be rendered. In the Con Ed case, the cash amount paid out was not allowed as a deduction although the taxpayer was out of pocket the cash involved and had paid whatever amount he owed.

It is submitted these results are inconsistent. If under the "all events" test the payment is not deductible, under the same test a receipt which is not yet earned is not accruable as income.

VIII.

In reaching its conclusion in this case, the Supreme Court relied on the fact that it was

> "stipulated by the parties in this case [that] the remittance or 'payment' did not admit, but specifically denied, liability for, and was not intended to satisfy, the contested $15 of the assessment, but was, in effect, a mere deposit 'in the nature of a cash bond for the payment of [so much, if any, of the contested] taxes [as might] thereafter be found to be due.'"

It is submitted such a stipulation is erroneous. All real estate tax payments to the City of New York—whether the subject of certiorari proceedings or not—go into the general revenues of the City, and if any refund later is

made interest is payable. 59 McKinney's Consolidated Laws of New York, Part 2, §296.

No distinction is made by the City between those amounts which are paid without question and those which are "disputed." A real estate tax payment made under such circumstances is not a "mere deposit" in the nature of a "cash bond."

While parties to a litigation may be free to stipulate as they wish, an erroneous stipulation should not adversely affect many thousands of other taxpayers who were not parties to the stipulation.

Timeliness of this Motion.

It is recognized that Rule 58, §1 of the Supreme Court Rules provides that a motion for a rehearing may be filed within twenty-five days after judgment or decision. It is noted, however, that the Court's decision in the *American Automobile Association* case, which is one of the grounds for asking for a rehearing, was rendered twenty-eight days after the decision in the *Consolidated Edison* case, and that the Court adjourned for the summer on the day the decision in the AAA case was announced.

It is also submitted that, since this motion is being filed, not by one of the parties, but in the interest of taxpayers generally, usual rules of timeliness should not operate against them.

Respectfully submitted,

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September 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 357

JOHN SCHROEDER, ET AL., *Appellants*

v.

HOMESTEAD CORPORATION, *Appellant*

Impleaded with

MARGARET A. WILLIAMS, ET AL., *Appellees*

On Appeal From the Supreme Court of Nebraska

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 357

JOHN SCHROEDER, ET AL., *Appellants*

v.

HOMESTEAD CORPORATION, *Appellant*

Impleaded with

MARGARET A. WILLIAMS, ET AL., *Appellees*

On Appeal From the Supreme Court of Nebraska

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm this appeal on the grounds:

1. That it does not draw in question the validity of any treaty or statute of the United States;

2. That it does not draw in question the validity of any statute of any state on the grounds of its being repugnant to the Constitution, the treaties or laws of the United States; and

3. That it does not involve any substantial federal question, but merely an adjudication of well-settled property law regarding accretion to real estate.

Since the grounds for an appeal under the Rules are lacking, it would seem the papers filed herein should be considered only as an application for a writ of certiorari.

REGARDING APPELLANTS' STATEMENT OF THE CASE

This is an appeal from the Supreme Court of Nebraska seeking to invoke the full faith and credit clause (Constitution, Article IV, Sec. 1) to compel Nebraska to recognize and enforce a judgment of a District Court of Iowa.

The only record before this Court is a transcript of the pleadings. The partial bill of exceptions tendered by Appellants to the Nebraska Supreme Court was stricken from the files by that Court for violation of its rules. The Jurisdictional Statement made by Appellants contains a great deal of material that is not in the record before this court, for example: *All references to (Record page —) are to the colored page numbers and not to the typewritten numbers.*

The last paragraph on page 4, all of pages 5, 6, 7, 8, and the first paragraph on page 9 are not supported by the record and no citations are given to support them except two, viz., a map of the land area in dispute (Record pages 28 and 95) and the certificate of the Iowa Clerk with reference to a former

judgment of the State of Iowa (copy not in Record) which notes the appearance in that court in previous litigation of Margaret Williams and W. W. Freeland (Record page 21).

There is no evidence in the record regarding the extent of the value of the property as asserted in paragraph 2 on page 4 of the Jurisdictional Statement.

There is nothing in the record to substantiate the statements in the last half of page 21, except as to Margaret Williams' appearance. (Record page 21).

There is nothing in the record to substantiate the statements in the last paragraph on page 22, going on to page 23, except that W. W. Freeland filed an appearance in this matter June 5, 1946 (Record page 21).

In view of these numerous statements outside the record Appellees feel it desirable to make an independent statement of the case strictly from the record.

STATEMENT OF THE CASE

The Petition

Appellant Schroeder, as the sole plaintiff filed a petition in the District Court of Washington County, Nebraska, January 6, 1956 (Record pages 12 and 34) seeking recognition in Nebraska of a certain judgment rendered by the District Court of Harrison County, Iowa, on December 30, 1952, copy of which judgment was attached (Record page 14). The judgment purports to fix title to certain real estate.

The Iowa Judgment attached to the petition runs only against one William W. Freeland and James Olson his agent. Despite the fact that Margaret A. Williams is a named defendant and was apparently served with notice (Record page 20), her

name does not appear in any way in the judgment sought to be enforced, nor do the names of any of the other Appellees.

There is a serious question of the adequacy of service relating to the Iowa Judgment since both Freeland and Williams who are nonresidents of Harrison County, Iowa, were served in Nebraska a Notice to Show Cause in Iowa only nine days before the date set for the hearing on a judgment which was at that time more than six years old (Record page 20). They did not appear and the Judgment was by default against Freeland alone.

Appellant Harrop, who is repeatedly referred to as a "co-owner" of the property, was not a party to the Iowa suit but appeared only as Attorney for Schroeder. The said Iowa decree makes reference to, and purports to be only a reaffirmation of a previous judgment of the Iowa Court, dated December 5, 1946, but no copy of such proceedings or judgment appears in the record (Record page 15).

The decree purports also to be bottomed on another judgment of the District Court of Harrison County, Iowa, in another case dated November 25, 1947, (Record page 15) and no copy of this judgment or proceedings related thereto is in the record.

The decree also depends upon a previous judgment of the U. S. District Court for the Southern District of Iowa, dated October 6, 1937, (Record page 15) but no copy of any such proceedings or judgment appears in the record.

The judgment recites that the court has jurisdiction of the parties and of the subject matter and that the real estate is recorded in the name of Schroeder in

Iowa and is "land lying west of the stabilized channel of the river established by the United States Army Engineers under the Iowa-Nebraska Boundary Compact of 1943 and that said real estate above-described is now situated in Harrison County, Iowa, and contiguous to the State of Nebraska." (Record page 18).

The Iowa Court bottoms a portion of its decree upon the fact that the real estate described "has never been allocated by the Legislature of Nebraska or placed within any county of Nebraska and the District Court of no county in Nebraska has any jurisdiction over said real estate." (Record page 17). The error of the Iowa Court's interpretation of Nebraska law will be discussed hereafter.

No answers of any kind appear to Plaintiff's petition in Nebraska until Appellant Schroeder thereafter applied for a writ of scire facias, (Record page 22), asking the Nebraska Court to dispossess all of the appellees. To this application, which was served on all appellees (Record page 33) the appellees filed answers.

The Answers

The answers of the Appellees Cady (Record page 43), Williams (Record page 48), Freeland (Record page 60), Bylund (Record page 53), and Tyson (Record page 64), are all based upon four similar grounds.

1. A claim of adverse possession of more than 20 years (the Nebraska Statute is 10); Sec. 25-202 R. S. Nebr. 1943.

2. Prior judgments of the Nebraska courts antedating the Iowa Judgment by many years and quieting titles in the Appellees or their predecessors to the lands in question;

3. That the land was accreted to the Nebraska side of the Missouri River (west of the main channel of the river, which is the Iowa-Nebraska boundary) over a period of more than 75 years, and, that the Iowa Court was utterly without jurisdiction to render a judgment foreclosing taxes on it, which is the sole basis of Appellants' claimed title.

4. That the Iowa-Nebraska Compact of 1943 had no effect upon the title to the property since it had all accreted to Nebraska land long before any such compact was made; that an interstate compact cannot affect private titles to real estate; further that the Appellants waited 13 years after the Iowa-Nebraska Compact was effective before asserting their rights in Nebraska, whereas the Iowa-Nebraska Compact provides that all such rights must be asserted within five years.

The *Cady* title (Record page 43) is alleged to be based on U. S. Patents, dated 1873-1875, and to the continuous possession through that chain of title ever since.

The answer alleges that Freeland, a predecessor in title, brought an action in the District Court of Washington County, Nebraska, against Harrop to quiet title, and Freeland was adjudged to be the owner of said land by a decree of that Court unappealed from, dated July 27, 1948.

The answer then pleaded that the land had accreted to Nebraska over many years long prior to the levy of any taxes or any entry of any court decree in Iowa.

It then alleged the inapplicability of the Iowa-Nebraska Compact, as well as the effect of the Statute of Limitations contained therein.

The *Williams* answer makes substantially the same allegations as to adverse possession and pleads that by a decree of the District Court of Washington County, Nebraska, dated June 16, 1933, title to said land had been quieted in her husband (Record page 49). The allegations regarding accretion and the effect of the Iowa-Nebraska Compact are substantially the same as the Cady answer.

The *Bylunds* answer alleges adverse possession and then pleads a judgment quieting title in their predecessors in the District Court of Washington County, Nebraska, in the year 1913 and follows substantially the same allegations regarding accretion and the Iowa-Nebraska Compact.

The *Freeland* answer (Record page 61) alleges adverse possession and then pleads an action by Freeland against Harrop et al. as set forth in the *Cady* answer, which decree it is alleged quieted and confirmed Freeland's title and enjoined the defendants, including Harrop, from interfering therewith. The answer makes the same allegations regarding accretion to the appellees' property prior to the time any taxes were levied in Iowa or any judgments rendered by any court in Iowa.

The *Tyson* answer alleges adverse possession and then alleges still another judgment in the District Court of Washington County, Nebraska, in which appellants Harrop, Schroeder and the American Cooperative Company (Homestead Corp.) were all defendants, and that said action resulted in a decree quieting title in the Tysons as against Schroeder and Harrop, dated November 17, 1955, only two months before this suit was instituted (Record page 54).

After these answers to the application for the writ of scire facias had been filed the transcript shows a series of demurrers by the Appellees (Record pages 73 to 82); motions for judgment on the pleadings and motion for summary judgment by Schroeder (Record pages 96-102), all of which were not ruled on by the Nebraska Court but were deferred for ruling until the time of trial.

Subsequently a trial was had on the issues as drawn, which trial continued intermittently over a period of three years and culminated in a decree and judgment entered in the District Court of Washington County on April 12, 1960, denying recognition of the Iowa judgment. (Record page 166). Since it is from this decree alone that the appeal was taken to the Nebraska Supreme Court, the following points of the decree should be noted:

1. The Court accompanied by counsel of both parties prior to the opening of the trial "entered upon and inspected all of the land involved." (Record page 166).

2. The Court found generally against the plaintiffs Schroeder and Harrop (Record page 167); that Defendants Olson and Freeland ceased to claim any interest in the property at the time of judgment.

The Court overruled the demurrers; the various motions for summary judgment; and then held (Record page 167 et seq.) "that when the State of Iowa was admitted to the Union in 1851, the area of land involved in this litigation was east of the Missouri River and was at that time in the State of Iowa, but that commencing in the year 1958 the Missouri River began to slowly and gradually move its channel

to the eastward and by a gradual process of deletion eroded all of said area from the State of Iowa and as said river gradually receded to the East, said area of land was rebuilt to the West of the Channel of said river and was joined to and was accreted to existing land in the State of Nebraska, and thereby ceased to exist in the State of Iowa and became a part of the State of Nebraska." The Court further held (Record page 168) "that all of the area of land involved in this action by said process of deletion and accretion existed in and as a part of the State of Nebraska and was owned by the defendants or their predecessors in title for more than ten years prior to any levy of taxes in Harrison County, Iowa, by said County or the State of Iowa or any governmental subdivision of said state, by reason of which levy of taxes the plaintiffs or their predecessors in title acquired any purported title to any of the disputed area, and that said area so existed more than ten years prior to any purported right or title acquired by the defendant Homestead Corporation, now designated American Cooperative Company." The Court further found that "all of said area of land herein involved had been for many years prior thereto and was then in existence as a part of the State of Nebraska at the time of enactment by the States of Nebraska and Iowa of the Boundary Compact Laws of 1943, and that said Boundary Compact Laws of said states had no application to nor effect upon said land." The Court then found that the Iowa Judgment sought to be enforced was of no force and effect for the "reason that said District Court of Harrison County, Iowa, had no jurisdiction over the land involved in this action, . . ." and held the Iowa judgment invalid and void and not entitled to registration as a foreign judgment.

The Court then specifically found the allegations in the several separate answers by the various defendants "with particular regard to their ownership of the several tracts of land involved herein and as specifically hereinafter described, are true and correct."

This decree was appealed to the Supreme Court of Nebraska but no proper bill of exceptions containing the evidence was presented to that Court. The Supreme Court on motion of appellees struck the bill of exceptions from the file and affirmed the case on the well settled principle that if the evidence is not tendered on appeal and if the pleadings support the judgment, the judgment will be affirmed. (Record page 213) 171 Nebr. 972, 107 N.W. 2nd 750.

It is clear from the foregoing that the judgment here sought to be enforced is only a supplemental judgment, runs on its face against only one of appellees, Freeland, and that the rights of appellants, if any, depend upon the original judgments of the Iowa Court rendered in 1946 and 1947 or a judgment of the Federal District Court of Iowa of October 7, 1937, none of which are in the record.

The only reference in the record upon which the jurisdictional statement of appellants purports to claim the application of res judicata is the certification of the Clerk of the Iowa Court of the 1952 judgment, to which the clerk appended a statement that in the 1946 proceeding "Margaret A. Williams was served in the original petition by publication June 14, 1946, and personally on June 17, 1946; and, I further certify that W. W. Freeland filed an appearance in this matter on June 5, 1946." There is no reference in the record as to whether or not Williams or Freeland pleaded further; as to whether the appearances filed

were general or special; as to whether any trial involving the production of evidence was ever held; as to whether or not appellees Williams and Freeland participated in such trial, or as to the findings of the Court with reference to the facts upon which its jurisdiction was founded.

QUESTIONS INVOLVED

1. Is the Iowa judgment herein sought to be enforced in Nebraska entitled to full faith and credit under the Constitution Art. IV, Sec. 1 or the Uniform Enforcement of Foreign Judgments Act?

(A) Has the Nebraska Court the right to inquire into and refuse to recognize the Iowa judgment sued upon on the ground that the Iowa Court entering said judgment had no jurisdiction of the subject matter of the action?

(B) Did the Nebraska Supreme Court properly strike from the record the partial bill of exceptions tendered to it by the Appellants as not conforming to the Rules of that Court?

(C) Can this Court, on certiorari, review the judgment of the Nebraska Court in the absence of any evidence whatever in the record upon which the Nebraska Court's judgment is founded?

ARGUMENT

This case is merely another of the numerous cases over the years involving accretion to land along the banks of the Missouri River, the middle of the main channel of which river constitutes the Iowa-Nebraska boundary. 9 Stat. CLXXXII, 13 Stat. CLIX-2.: If the land in question was accreted to the Nebraska side of the river during the

period from 1858 to about 1920, long before the Iowa judgment was rendered, as the Nebraska Court found, and has been in the possession of the Appellees since the latter date, then the decision is correct. Even if the land in question had been transferred to the Nebraska side of the main channel of the river by avulsion, then the title of the Appellees by adverse possession was also affirmed by the Nebraska Court by its general findings.

Since the basis upon which Nebraska denied enforcement of the Iowa judgment was upon purely factual grounds regarding the action of the Missouri River over a long period of years, and since the Appellants, by failing to comply with the rules of the Nebraska Court, are unable to supply to this Court any of the evidence upon which the Nebraska determination was made, it would seem there is no basis upon which this Court can form any judgment as to the validity of the Nebraska District Court decree, which was affirmed by the Nebraska Supreme Court.

The Iowa judgment here sued upon, under which Appellants claim title to this land, was based upon the foreclosure of taxes levied by Harrison County, Iowa, upon land presumed from the original Government surveys of 1851 to be in Iowa. There is, of course, in the record no indication of what, if any, evidence regarding the actual existence and location of the land the Iowa Court may have had before it when the Iowa judgment was rendered, but the Nebraska Court found that beginning in 1858, by a slow and gradual process, the main channel of the Missouri River, constituting the State boundary, had moved steadily eastward washing away the east (Iowa) bank and at the same time depositing other silt on the west (Nebraska) bank of

the river and that the land thus accreted to the Nebraska land of Appellees; that said land, which is the subject of this suit, had all been on the Nebraska side of the main channel for many years prior to the time that Iowa levied its taxes, Appellants acquired their tax deed and judgment and long prior to the Iowa Nebraska Boundary Compact of 1943 on which Appellants partially rely.

The Nebraska Court Has the Right to Inquire Into and Refuse to Recognize the Iowa Judgment Sued Upon Here on the Grounds That the Iowa Court, Which Entered Said Judgment, Had No Jurisdiction Over the Subject Matter of the Action

In *Joseph J. Thompson, Plaintiff in Error,* v. *John Whitman,* 18 Wall. 457, 21 L. Ed. 897, the Supreme Court, speaking through Mr. Justice Bradley, said: "On the whole, we think it clear that the jurisdiction of the Court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the Fourth Article of the Constitution and the Law of 1790, and notwithstanding the averments contained in the record of the judgment itself." This case has been repeatedly followed.

Knowles v. *Logansport Gas Light & Coke Co.,* 19 Wall. 58, 22 L. Ed. 70, reaffirmed the preceding case and held that notwithstanding the record of the first judgment showed a return of service personally made upon the plaintiff in error that he was still entitled to show in an action in another state to enforce that judgment that he was not served and that the Court never acquired jurisdiction of his person.

The same rule was again affirmed in *Hall* v. *Lanning,* 1 Otto 160, 23 L. Ed. 271.

In *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 84 L. Ed. 85. The same rule was stated even more succinctly when Mr. Justice Reed said: "The power of the Idaho Court to examine into the jurisdiction of the Washington Court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court."

This rule is affirmed in *Milliken* v. *Meyer*, 311 U.S. 457, 85 L. Ed. 278. See also *Fall* v. *Fall*, 75 Nebr. 104, 113 N.W. 175, *Fall* v. *Eastin*, 215 U.S. 1, 54 L. Ed. 65, discussed hereafter.

The same doctrine has been applied in several divorce cases following *Williams* v. *North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577.

There would seem to be no question of the right of the Nebraska Court to inquire into the jurisdiction of the Iowa Court which rendered the judgment and to determine that the land in question had not existed in the State of Iowa for many years prior to the Iowa judgment and the Iowa Court rendering the judgment had no jurisdiction.

The Supreme Court of Nebraska Acted Properly in Striking the Appellants' Tendered Bill of Exceptions From the File

The Nebraska Supreme Court is authorized by statute to promulgate rules of practice regarding the preparation and filing of bills of exception.

Nebr. Laws, 1959, C. 104, § 1, effective September 28, 1959; 1959 Cumulative Supplement Revised Statutes of Nebraska, § 25-1140, provide: "Upon appeal from the District Court to the Supreme Court the party appealing may order a bill of exceptions by filing

in the office of the clerk of the District Court a praecipe therefor within the time allowed for filing a notice of appeal. The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of the bill of exceptions shall be regulated and governed by Rules of Practice prescribed by the Supreme Court."

Pursuant to such authority, the Supreme Court of Nebraska promulgated Rule 7, (page 19 Jurisdictional Statement), which provides, among other things, for the filing with the clerk of the District Court of a praecipe for a bill of exceptions within the time allowed for filing of a notice of appeal.

The Rule further provides: 7 (c) "How Ordered. Unless otherwise specified there, a praecipe requires that *all of the evidence offered at the trial* and *all* of the evidence offered at any hearing on any matter and the ruling thereon be included in the bill of exceptions. *Appellant may*, in the alternative, *specify in the praecipe that less than all of such evidence be included in the bill of exceptions;* however, the bill of exceptions shall be so prepared *only if the written consent of all other parties be endorsed on or attached to such praecipe."* (Emphasis supplied.)

The praecipe filed by Appellants requested only the transcript of Appellants' own testimony and omitted all testimony offered by Appellees. (Record page 179).

Subsequently Appellees appropriately moved for an order to strike the bill of exceptions (Record page 189), supported by affidavit, showing that the testimony of ten appellee witnesses was not included

in the record and that neither Appellees nor their counsel had given any written consent to the presentation of a partial bill of exceptions, nor was such consent "endorsed on or attached to such praecipe" as required by the Rules. (Record pages 191-3).

The said bill of exceptions, as tendered, being clearly in violation of the Rules of the Nebraska Supreme Court, that Court properly sustained the motion and ordered the tendered partial bill stricken from the file. (Record page 209).

It should be further noted that Appellants did not ask the Nebraska Supreme Court for additional time to prepare a complete bill of exceptions on the grounds of hardship or misunderstanding of the rule or seek any relief from said Court from the situation in which they found themselves, but relied instead on attacking the Court's interpretation of its own Rules. It would seem that the right of the Nebraska Supreme Court to interpret and enforce its own Rules when so clearly set forth should be beyond question.

The Respective Jurisdiction of the Iowa and Nebraska Courts Is Dependent Upon Which State the Land Was Located in at the Time of the Rendition of the Respective Judgments

This problem is purely one of factual determination on which there is no evidence available to this Court.

This Court long since adopted the well-settled common law relating to accretion and avulsion along the banks of streams and specifically the Missouri River.

As early as 1836 in *New Orleans* v. *the United States*, 35 U.S. 662, 10 Pet. 662, 9 L. Ed. 573, 594, this Court said: "The question is well settled at common law that the persons whose land is bounded by a stream of water which changes its course gradually

by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain."

Banks v. *Ogden*, 69 U.S. 57, 2 Wall. 57, 17 L. Ed. 818 (1865) and *Shively* v. *Bowlby*, 152 U.S. 1, 38 L. Ed. 331, 344 (1893) repeat the rule.

This rule has been twice applied by this Court on boundary matters along the Missouri River in a county in Nebraska adjoining that in which the land here under consideration is located.

Jefferies v. *East Omaha Land Co.*, 134 U.S. 178, 33 L. Ed. 872 (1890), arose in Nebraska downstream below the land in question. One Jefferies entered claim to Lot 4 along the west (Nebraska) bank of the Missouri River in the United States Land Office in October, 1853. There was constant accretion to the land. The Court said: "At about the time of original entry of Lot 4 by Edmund Jefferies, new land was formed along and against the whole length of the north line thereof and from that time continued to form until 1870, so that in that year, at a distance of 20 chains and more from the original meander line before described, and within the lines of the lot on the east and west running north and south, a tract of forty acres and more had been formed by accretion to the lot and ever since had been and now is a part thereof."

The opinion further said, after quoting the opinions in *New Orleans* and *Banks*, *supra*, with reference to accretion: "The rule is as applicable to the

Missouri River as it is to the Mississippi. Whether the principle on which it rests be that the riparian owner is entitled to the addition to his land because he must bear without compensation the loss of land caused by the action of the water and any consequent expense of repair to the shore, or whether that principle be one of public policy in that it is in the interests of the community that all land should have an owner and most convenient that insensible additions to the shore should follow the title to the shore." Following this, the Court decreed that the land in question belonged to the landowner to whom the land became attached.

In *State of Nebraska* v. *State of Iowa*, 143 U.S. 359, 36 L. Ed. 186, the matter at issue was land along the west (Nebraska) bank of the river claimed by both Iowa and Nebraska. After quoting elaborately from authorities, the Court said: "The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel and that avulsion would establish a fixed boundary, to wit, the center of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri River on account of the rapid and great changes constantly going on in respect to its banks, but the contrary has already been decided by this Court in *Jefferies* v. *East Omaha Land Co., supra.*" . . . . "Our conclusions are that notwithstanding the rapidity of the changes in the course of the channel and the washing from one side and onto the other, *the law of accretion controls on the Missouri River* as elsewhere, and that *not only in respect to the rights of individual land owners, but also in respect to the bound-*

ary lines between states. The boundary, therefore between Iowa and Nebraska is a varying line so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream." (Emphasis supplied.)

On the evidence produced in this particular case the Court held that the change in the river had been sudden by avulsion and did not result in a change of the Iowa-Nebraska boundary. However, the rule therein adopted would seem to settle beyond argument that the boundary line between the two states, which is the center of the main channel of the river, changed with the shifting of the channel and that land accreted to the Nebraska side became land in Nebraska and passed to the ownership of the persons against whose land the accretion was deposited. The Nebraska District Court decree, affirmed by the Nebraska Supreme Court, from which this appeal is taken, recites almost exactly the same historic background (Record page 167) as the preceding Jefferies and Iowa-Nebraska cases, viz., that the accretion to the Nebraska side began shortly after 1858 and continued well past the turn of the century. In the absence of any bill of exceptions before this Court, it is difficult to see on what grounds reversal is sought.

Attention is also invited to a suit between these same parties in the United States District Court, Nebraska, Omaha Division, having the same parties as the present litigation. *Schroeder* v. *Freeland*, 89 F. Supp. 169. The litigation is apparently identical. These same Appellants in that case brought a suit to quiet title to this same land and to eject the tenants therefrom, based their right on the same "tax deeds" which had been issued by the State of Iowa. In that

case, Donohoe, Chief Judge, after reciting the Rule of Law set forth in *Nebraska* v. *Iowa*, *supra*, said: "The plaintiffs cannot maintain this action unless the State of Iowa had authority to levy upon and sell the lands in question. It is true that in the year 1858, these lands were in the state of Iowa. At that time all of these lands were on the east side of the west bank of the river. But since then, the Missouri River has continually moved eastward so that now all the lands in question are on the west side of the east bank of the river. If the river changed its course by a sudden avulsion, then the state of Iowa did not lose jurisdiction of the lands in question and the tax deeds issued to the plaintiffs would be valid. On the other hand, if the river has changed its course by slow accretion, then the state of Iowa has lost jurisdiction of the lands as they have become a part of the State of Nebraska, and more specifically, a part of the estates of the defendants, who reside on the west bank of the river.

"The uncontroverted testimony of several of the witnesses established the fact that the Missouri River has changed its course by a slow process of accretion. The expert testimony of the engineer, and the maps and charts which he clearly explained, illustrated the constant movement of the river to the east from 1856 to 1940. Each survey which was taken during that period of time showed that the river was continually changing its course; and the later the survey, the farther east the course. It is true that the change represented on the maps and charts could have been by an avulsion, but the uncontradicted testimony of those who had lived by the river for years, was that the change was slow; that the water washed away the

land on the Iowa side and later deposited mud and sand on the Nebraska side, as is the case in the ordinary process of accretion. As the alluvial deposits were made, the defendants would extend their boundaries to the edge of the river, thereby increasing their estates.

"[4] In the light of all the evidence, it sems clear that the tax deeds issued by the state of Iowa were of no force and effect because the land was in Nebraska and had, under the rule of *State* v. *Nebraska* v. *Iowa*, *supra*, become part of the estate of the defendants."

While it is true that on appeal, *Schroeder* v. *Freeland*, 188 F. 2d 517, the Court of Appeals, 8th Cir., reversed this case on purely jurisdictional grounds, it is ventured that the factual determinations therein made are substantial confirmation of the Nebraska State Courts' findings.

In *Chicago Mill and Lumber Co.* v. *Tully*, 130 F. 2d 268, 8th Cir., a situation almost identical to the case at bar arose in that claimants had secured tax deeds based upon old descriptions of land which had eroded away and been formed elsewhere by accretion. The Court said: "We think the Master and the Trial Court correctly held that plaintiffs' payment of taxes upon the nonexistent descriptions was unavailing to deprive the defendants of their accretion. Plaintiff concedes that all of the areas surveyed on the Government plats as Sections 18, 19, 20, etc., caved into the Mississippi River and the present formation is all remade, re-formed land and not the land shown in the original survey. There are now no such legal descriptions. (Citing cases.) The defendants were fully protected in their title by their tax payments upon their land by proper legal descriptions for more than forty years. (Citing cases)."

Anderson-Tully Co. v. *Chicago Mill & Lumber Co.*, 175 F. 2d 735, 8th Cir. is likewise similar in its facts to the case at bar. The Court said: "[4] The appellants have a tax title to, and for the 24 years preceding the filing of this action have themselves or through predecessors in interest paid taxes on a description 'Frl Section 17, Township 1 North, Range 6 East, in Lee County, Arkansas' and it is shown that that description appeared in the government survey of 1824 and there identified land in place then situated in the same geographical position now occupied by the accretions to appellee's land referred to as the area in controversy in this action. Appellants rely upon that tax title and tax payments.

"But prior to about 1891 the Frl Section 17 marked on the old survey was washed away by the river and was covered by the deep channel. The description ceased to identify any land in place which was subject to individual ownership or use. As the new land was thereafter formed by the accretions and was added to the riparian ownership, that is, to appellee's ownership, the description of the riparian land included the accretion and as the Arkansas court put it, 'All original lines [implied in the old original description] ceased to exist.' *Wallace* v. *Driver*, 61 Ark. 429, loc. cit. 423, 33 S.W. 641, 642, 31 L.R.A. 317. In that situation this court held, in *Chicago Mill & Lumber* v. *Tully*, 8 Cir., 130 F. 2d 268, that in paying taxes on an obsolete description analogous to 'Frl Section 17' of the old survey which had ceased to define land in place subject to private ownership and use did not operate to deprive the riparian owner of the accretions to his riparian land."

The Appellants' Claim of Res Adjudicata for the Iowa Judgment

The appellants urge the doctrine of Res Adjudicata as supporting the Iowa judgment.

A short answer is that a judgment never becomes res adjudicata unless the court had jurisdiction of the subject matter, the very question concerning which the court in the sister state has the right to inquire.

Both the courts of Iowa and Nebraska have determined that the decrees of other states, even though valid decrees otherwise, cannot affect the title to real estate within their borders.

Beach v. *Youngblood*, 215 Ia. 599, 247 N.W. 545. This was a suit on a promissory note combined with a mortgage foreclosure on Minnesota land. The lower court decreed a lien on the Minnesota land and directed its sale. The Iowa court reversed saying "a decree of a court in this state cannot affect the title to real estate in any other state or in Minnesota."

In *Youngs* v. *Youngs*, 197 Ia. 101, 195 N.W. 795, the Iowa Court said of a New York decree "but even if the said letters had been submitted to the New York Court, the land being in Iowa, determination of the question of the title thereto would be exclusively a matter for determination by the Iowa courts."

In *Fall* v. *Fall*, 75 Nebraska 104, 103 N.W. 175, the Nebraska court affirmed the identical rule. It gave full faith and credit to a Washington State divorce decree insofar as the same was *in personam* but denied its effect so far as the title to real estate in Nebraska was concerned. The same case come to this court on certiorari and appears as *Fall* v. *Eastin*, 215 U.S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65. This court affirmed, point-

ing out that while the Washington judgment was entitled to full faith and credit insofar as the rights of the divorced parties were concerned, that it was not entitled to full faith and credit against lien holders in Nebraska insofar as it undertook to pass title as against such lien holders, jurisdiction of the lands being absent.

Lastly, it should be pointed out that the mere certification of the Iowa clerk that two of these appellants "appeared" in earlier litigation without any showing as to the subsequent course of the litigation, whether they answered; participated in the trial; whether evidence was taken, etc., is not enough to sustain the judgment in any event as being res adjudicata.

The Iowa-Nebraska Compact Relating to the State Boundaries Is Utterly Irrelevant to This Case

This compact fixed a channel by surveying points established by the Corps of Engineers, United States Army. At all stages of these proceedings appellants have made the same claims that this boundary compact had some effect on the litigation involved. The compact (Laws of Nebraska 1943, c. 130, p. 434, and Laws of Iowa 1943, p. 797) provides:

Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands shall be accorded full force and effect in Iowa.

Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: Provided, that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

The decree of the Iowa court itself says that these lands are west of that established channel. (Record page 18). If that is true, and the Nebraska court held the same thing, then jurisdiction of the land was ceded to Nebraska. The last sentence of Sec. 4 would have required the assertion of the claims of appellants under the Iowa decree to have been asserted in Nebraska within five years after 1943 or by 1948. The petition in this case was not filed until 1956. This alone would seem to settle any possible effect of the compact on the jurisdiction of the courts.

In addition thereto the court of appeals said in *Schroeder* v. *Freeland*, 188 F. 2nd 517, "It is, however, argued that the point resolution of the legislatures of Nebraska and Iowa, concurred in by Congress, conferred rights upon the parties. But this legislation had no effect upon the title of the lands here involved. As said by the Supreme Court of Texas in *Miller* v. *Letzerich*, 121 Tex. 248, 49 S.W. 2d 404, 407, 85 A.L.R. 451, 'It is elementary that a change of sovereignty does not affect the property rights of the inhabitants of the territory involved.' See, also: *United States* v. *Perche-*

man, 7 Pet 51, 8 L. Ed. 604; *Airhart* v. *Massieu*, 98 U.S. 491, 25 L. Ed. 213."

CONCLUSION

From all of the foregoing it seems that if the factual determination made by the Nebraska Court is true, that all of the accreted land, which appellants seek to recover, has been a part of the State of Nebraska beginning in 1858 and continuing since that time, there was no jurisdiction in the Iowa court over the land in question justifying the rendering of judgments in 1946, 1947 or 1952.

The Nebraska court was entitled to examine the basis of the jurisdiction of the Iowa court; to determine that no such jurisdiction existed in Iowa and that the judgment was not entitled to full faith and credit.

Respectfully submitted,

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SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
OCT 4 196
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 357

UNITED STATES,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

MEMORANDUM IN OPPOSITION TO MOTION BY *AMICUS CURIAE* FOR A REHEARING, AND, IF GRANTED, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Respondent, Consolidated Edison Company of New York, Inc., opposes the motion made by Mr. A. Chauncey Newlin "as amicus curiae and in behalf of taxpayers generally * * * for a rehearing of this case", for the following reasons:

I

The Applicant Has No Standing in This Case Before This Court

The judicial power and appellate jurisdiction vested in this Court by the Constitution[1] extends only to "cases" and "controversies"; i.e., it is limited to the determination

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[1] Article III, Section 2.

of justiciable issues in an actual controversy between parties.[2] Mr. Newlin, the applicant, is not a party in this case, nor is there present a justiciable issue in an actual controversy between him and either of the parties herein.

Although Rule 42 of the rules of this Court, permits a person, not a party to a proceeding in this Court, under certain circumstances and upon compliance with specified preconditions, to file a brief as *amicus curiae*, it does not elevate such person to the status of a party to the "controversy" so as to enable him to seek to reopen a proceeding in this Court which has been duly heard and terminated by a final decision of the Court. So to extend the Rule in the present application of Mr. Newlin, would establish a precedent whereby any taxpayer, dissatisfied with a final determination of this Court, could, as a self-appointed amicus curiae, move for a rehearing of the case in which the decision and judgment was rendered contrary to his views.

Moreover, even if such a precedent were desirable—which it is not—the applicant, by this motion, seeks to do indirectly that which he is barred from doing directly. Though labelled a motion for a rehearing, it is, in effect, a motion for a declaratory judgment "in behalf of taxpayers generally" upon whom "[t]he decision for the Respondent [in the present case] will mean a hardship * * * [and] whose case, as such, was not presented to the Court". The Declaratory Judgment Act,[3] however, specifically excepts therefrom any determination "with respect to Federal taxes".

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[2] *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237, 242-244 (1952); *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227 (1937); *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 723-724 (1929).

[3] 28 U. S. C. § 2201.

II

The Applicant's Motion is Untimely and Fails to Comply with the Rules of this Court

Considering the applicant's motion solely in the light of the Rules of this Court, it is untimely and fails to comply with those rules, whether it be considered (1) a motion for rehearing, as the applicant entitles it, or (2) a motion for leave to file a petition for rehearing as amicus curiae, as the Clerk of this Court characterizes it.[4]

The Government's petition for certiorari was filed August 23, 1960; certiorari was granted November 14, 1960; argument was heard on April 24, 1961; the unanimous decision and judgment of this Court was rendered on May 22, 1961; and it became final during the October 1960 Term, on June 16, 1961, when the Government failed to petition for a rehearing. The present motion was filed with the Clerk of this Court on September 19, 1961 after the October 1960 Term had ended.

As a motion for rehearing it is untimely. Rule 58(1). Indeed, Rule 58(4) provides that "petitions for rehearing that are out of time under this rule, will not be received."

As for persons appearing as *amicus curiae* in a proceeding before this Court, Rule 42 specifically sets forth the time and the requisite conditions under which it may be done. The applicant could have availed himself of either Rule 42(1) prior to the consideration by the Court of the

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[4] In his letter to Mr. Newlin, copy of which was forwarded to counsel for Respondent, the Clerk acknowledged the receipt of "40 copies of your motion for leave to file a petition for rehearing as amicus curiae."

Government's petition for writ of certiorari,[5] or Rule 42(2) with respect to filing a brief on the merits by a timely application after the Government's petition for certiorari was granted. He did neither. As an application as *amicus curiae* it is also untimely. Moreover, as an *amicus curiae* pleading it is defective in that no request was ever made for Respondent's consent to applicant's appearance in this proceeding as *amicus curiae* nor has the applicant stated the nature of his interest as required by Rule 42(3).

III

The Basis upon which the Applicant Seeks a Rehearing Has no Merit

The applicant bases his motion on the ground that a third alternative for the solution to the problem presented in this case had not been argued before this Court. The following was the question presented: in the light of the decision in *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516 (1944), that a contested tax liability does not accrue until the contest is terminated, when, and to what extent, does a contested local tax liability, which is involuntarily paid during the contest, accrue and become deductible under Section 23(c)(1) of the Internal Revenue Code of 1939? The Government argued that it accrues and is deductible in the year it is paid, in the amount of the payment. The Respondent argued that it accrues and is deductible in the year the contest is terminated, in the amount then determined to be due.

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[5] The applicant, as counsel for the New York Telephone Company, which had a similar claim against the Government, had availed himself of this provision in *Consolidated Edison Company of New York, Inc.* v. *United States*, No. 695, October Term, 1955, where a writ of certiorari to the United States Court of Claims was sought. We understand that the Telephone Company settled its claim against the Government for $1,000,000 before Respondent had successfully prosecuted its appeal in the Court below.

The applicant maintains that neither of these alternatives is correct;—that the amount ultimately determined to be due should be related back to the year for which it was assessed and should be allowed as a deduction in that year. The Commissioner took this position in *Stanard-Tilton Milling Co.*, 3 T. C. 1026, 1029-30 (1944) (second issue) but was overruled because it was contrary to the principle enunciated by this Court in *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281 (1944),—that an event must be reflected in the year it occurs and may not be related back to an earlier year in which the transaction, out of which it arose, took place. (acq. CB 1949-1, 3.) The principle for which the applicant contends is contrary to both *Dixie Pine* and *Security Flour Mills;* and his reliance upon *Bartlett* v. *Delaney*, 173 F. 2d 535, is misplaced on two counts, namely, (1) it involved a cash basis taxpayer and (2) the taxpayer had *voluntarily* elected to pay the asserted deficiency when he could have refused payment and contested its validity by filing a petition in the Tax Court.

Conclusion

It is respectfully urged that the motion be stricken from the records of this Court and returned to the applicant because he has no standing in this case for the making of this motion, and that to give it recognition by passing thereon would set a precedent for any person, who may hereafter be dissatisfied with a decision of this Court, to come into this Court and make a similar motion. Failing such disposition, the motion should, in any event, be denied because of the above reason and also because the motion is untimely, contrary to the Rules of this Court and without merit.

Respectfully submitted,

JAMES K. POLK,
Counsel for Respondent.

Of Counsel:

RICHARD JOYCE SMITH
JULIUS M. JACOBS

[redacted]

FILED

[redacted]

In the

Supreme Court of the United States

[redacted]

October Term, 1956

No. 69

[redacted]

[redacted] et al., Appellants,

v.

[redacted], Appellant

[redacted]

[redacted] A. [redacted], et al., Appellees.

[redacted]

[redacted] on Supreme Court of Virginia

[redacted]

[redacted]

[redacted]

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In The

Supreme Court of the United States

October Term, 1961

No. 357

JOHN SCHROEDER, et al., APPELLANTS,

V.

HOMESTEAD CORPORATION, APPELLANT

Impleaded with

MARGARET A. WILLIAMS, et al., APPELLEES.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

REPLY TO MOTION TO DISMISS OR AFFIRM

While the motion to affirm and dismiss, is a skillful evasion of fundamental facts in this case, it would not be necessary to file a reply brief but for the confusing and misleading contradictory statements, appearing therein and failing to refer to United States surveys or maps, showing the area of appellants and the state location and having misquoted the Federal Court of Nebraska, and Circuit Court of Appeals, makes it necessary to correct erroneous statements to clarify the record.

In this Reply Appellants will assume that the five persons who signed the Motion to Dismiss or Affirm are entitled to represent or act for Appellees, although there is nothing in their Motion to indicate the principal or principals for whom they speak. In this Reply unidentified page references are to the Motion to Dismiss or Affirm.

Because this case involves a geographical area and land locations, understanding the legal issues is difficult without a map of the Iowa area. Accordingly, Appellants have attached as Appendix A to this Reply a map of the area. This is the same map that is contained on page 28 of the Record, and Exh. 22 R.

The Motion to Dismiss or Affirm argues that a state court asked to enforce a judgment of a sister state may examine the jurisdiction which the judgment-rendering court possessed over the property and person, and, if jurisdiction over the person is lacking, refuse to give full faith and credit to the sister state's decree. Undoubtedly this is settled law. But in this case the Nebraska court did not refuse enforcement of the December 30, 1952 Iowa decree because Iowa lacked jurisdiction over the person. The Motion to Dismiss or Affirm states, the Nebraska refusal was based ". . . upon purely factual grounds regarding the action of the Missouri River . . . ." Page 12. Thus, we are told by the Motion that the Iowa decree failed to gain recognition because the Nebraska court found the Missouri River had removed the disputed land beyond the boundaries of Iowa and hence outside the power of her courts. The Nebraska decision was not based upon any holding that the Iowa court failed to

acquire personal jurisdiction over W. W. Freeland and Appellee Williams under Art. IV, Sec. 1 of the U.S. Constitution.

As to Freeland and Appellee Williams, and their privies Bylund and Tyson, Appellees, the Motion contends that the record fails to disclose whether they filed general or special appearances; whether they participated in the Iowa trial; and what evidence they, or anyone else, produced before the Iowa court. Pages 10-11, 24. If any of these matters justify Nebraska's Courts refusal to recognize the decree of a sister state, and Appellants deny that they do, the short answer is that none of these points were raised by the Appellees in the Nebraska court, no findings of fact were made about them, and by Appellees' admission, the Nebraska court did not base its refusal to enforce the Iowa judgment upon them.

Appellants do not believe that the burden of alleging or proving these factual matters constitutionally can be placed upon them by the courts of Nebraska. In *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940) the Supreme Court of the United States, quoting from *Adam* v. *Saenger*, 303 U.S. 59, 62 (1938) stated: "But if the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction *over the cause and the parties* is to be presumed unless disproved by extrinsic evidence, or by the record itself.'" (Emphasis Added).

The following federal issue is one of several squarely presented by this case: Under the full faith and credit clause of the federal constitution, may a Nebraska court refuse to enforce a Harrison County District

Court Iowa judgment determining title to land and running against appellees who were served and appeared in the Iowa action with full opportunity there to raise and litigate the Iowa court's jurisdiction over the land? Appellants view this question as substantial, and the Nebraska court's answer to it, squarely contrary to prior decisions of the Supreme Court of the United States.

Appellees argue that the Nebraska court had jurisdiction over the land involved in this dispute. There is nothing in the record to prove it. They contend that the Nebraska court might have found under the doctrine of accretion that the disputed land was within the boundaries of Nebraska. They further argue that this raises no federal question that if it did, the evidence on the issue of accretion is not before the United States Supreme Court; and that the Nebraska court decided the accretion issue correctly. Appellants are in record which show their title and ownership to Iowa lands and payment of taxes for over 21 years.

Appellees refer to the decision of *Schroeder* v. *Freeland*, 89 F.Supp. 169 in support of their contention that the Nebraska court correctly decided that the land had shifted to Nebraska's side of the border. Pages 19 to 21.

The full answer to Appellees' reliance upon the judgment in the above-cited case is that the judgment was reversed by the Court of Appeals on the ground that the federal district court lacked jurisdiction under the Judiciary Article of the United States Constitution. 188 F.2d 517 (C.A. 8th 1951). Accordingly, the judgment and opinion of the federal district court is with-

out any legal effect in favor of Appellees. On the contrary it favors Appellants' titles in Iowa.

Furthermore, Appellants do *not* contend that the federal question presented by this appeal is whether sufficient evidence existed to support the Nebraska court's holding that the disputed land had "accreted" to Nebraska's jurisdiction. What Appellants do contend is that between the parties to the instant litigation, under the Federal Full Faith and Credit Clause, and the implementing congressional legislation, the jurisdictional fact of whether the land had "accreted" to Nebraska sovereignty was foreclosed by the prior, contrary, Iowa decision. The question is not whether the Nebraska court erred in law or fact in what it did; the question is whether the Nebraska court had power to re-examine an issue previously adjudicated by the Iowa judicial system of a sister state of the Union, and deny said judgment full faith and credit under Sec. 3, of the Iowa-Nebraska Compact 1943.

Neither of the two cases discussed by Appellees on pages 21 and 22 of their Motion (*Chicago Mill and Lumber Company* v. *Tully*, 130 F.2d 268 and *Anderson-Tully Co.* v. *Chicago Mill & Lumber Co.*, 175 F.2d 735) is at all comparable to the instant case. In neither cited case was there a conflicting judgment of a sister state of Iowa which a party contended was entitled to full faith and credit. The constitutional significance of the 1952 Harrison County Iowa judgment in the instant case cannot be handled by ignoring its existence. This Court aptly put the same thought: "The past cannot always be erased by a new judicial declaration." *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940).

In the Motion to Dismiss or Affirm filed by the Appellees on page 8 of said Motion the last paragraph reads as follows:

The Court overruled the demurrers, the various motions for summary judgment; and then held (Record Page 167 Et.Seq.):

> "That when the State of Iowa was admitted to the Union in 1851, the area of land involved in this litigation was east of the Missouri River and was at that time in the State of Iowa, *but that commencing in the year 1958 the Missouri River began slowly and gradually to move its channel to the eastward and by a gradual process of deletion erode all of said area from the State of Iowa* and as said river gradually *receded to the East*, said area of land was built to the west of the channel of said river and was joined to and was accreted to the existing land in the State of Nebraska, and thereby ceased to exist in the State of Iowa, and became a part of the State of Nebraska." (Emphasis is ours)

Appellants Map Exhibit No. 22 in their Bill of Exceptions is the only evidence now before the United States Supreme Court which shows the lands involved in this litigation. The appellees' Motion to Dismiss, as quoted above, is erroneous, inaccurate and contrary to the evidence in the record, adversely effected and is written and incorporated therein for the express purpose of prejudicing the minds of this Court and concealing the true facts as shown by the record. There is no evidence that any lands embraced in the description as shown by Exhibit No. 22 were eroded from the State of Iowa in 1958 and accreted to the State of Nebraska; this statement is false and untrue, without

foundation, contrary to law and the evidence introduced by the appellants and takes their property in violation of Art. 14, Sec. 1 of the U.S. Constitution.

We call to the attention of this Court and ask it to take judicial notice that in the judgment and decree in the District Court of Washington County, Nebraska, dated April 12, 1960, by Jackson B. Chase, District Judge, we quote from paragraph 7 p. 160 of said decree in R.:

> "The court specifically finds that the purported foreign judgment and decree of the District Court of Harrison County, Iowa, dated December 30, 1952, said decree being entered in Case No. 18,376, is void and of no force and effect for the reason that said District Court of Harrison County, Iowa, had no jurisdiction over the land involved in this action, *said land being then and for many years prior to any of the incidents set forth in the pleadings of said Iowa action non-existent in the State of Nebraska* . . ." (emphasis is ours)

The appellees decree on its face shows that the appellants' land was not within the territorial jurisdiction of the District Court of Washington County, Nebraska and is therefore null and void.

Appellees' statement on page 23 of their Motion that a ". . . judgment never becomes res adjudicata unless the court had jurisdiction of the subject matter . . ." denies that subject matter jurisdiction is subject to the principles of res judicata. This is, of course, contrary to decisions of this Court, particularly, *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940). That decision clearly held that the issue of subject matter jurisdiction was not open to collateral attack by a person who had opportunity to litigate that issue in a prior judicial proceeding. The *Chicot County*

decision held that a person was not ". . . privileged to remain silent and raise it [subject matter jurisdiction of a court] in a subsequent suit." 308 U.S. at page 378. The privilege denied by this language is exactly the privilege that the Appellees claim in their Motion—the privilege of remaining silent during the Iowa proceeding and of litigating anew in Nebraska the subject matter jurisdiction of the Iowa court, is res adjudicata.

Appellees dispose of the Iowa-Nebraska Boundary Compact of 1943 by urging two points, first, that it does not affect private land titles, and second, that it does affect private land titles, but provides a 5 year period within which the compact rights of private owners must be asserted. Pages 24 to 26. Which of these inconsistent positions is correct presents a substantial federal question. However, Appellants cannot agree with Appellees' position on either point. Section 3 of the Iowa-Nebraska Compact protects Appellants "titles, mortgages and other liens . . ." To construe this language not to apply to private property rights either gives the quoted language no real legal significance, or twists its meaning in a manner which Appellants cannot presently perceive and upon which Appellees have not elaborated in their Motion.

Section 4 of the Iowa-Nebraska Compact, of 1943 which contains the 5 year limitation period, provides that "Taxes . . . may be levied . . . and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized . . . ." The section concludes: ". . . all liens or other rights accrued or accruing as aforesaid . . ." shall be asserted within a 5 year period. Appellees contend that this 5 year lim-

itation applies to the private rights protected by Section 3 of the Compact ("Titles, mortgages, and other liens good in Iowa shall be good in Nebraska . . ."). Appellants paid taxes on lands from 1938 to 1959 as shown on Appendix A. With this construction Appellants cannot agree. Properly construed the limitation period, applicable by the language of section 4 to "liens or other rights . . . as aforesaid," applies only to the rights specified in section 4, and is inapplicable to the private title rights of appellants specified in section 3.

This Reply is not the place to argue this construction issue fully. Appellants respectfully submit that the proper construction of the Iowa-Nebraska Compact presents a substantial federal question of such magnitude and importance that this Court should resolve it and settled this litigation that has before state & federal Courts for past 16 yrs. in a vexatious manner.

Appellees complain in their Motion to Dismiss or Affirm that the following judgments and decrees are not in the Transcript of Record filed in this case: (1) The Iowa decree dated December 5, 1946, (2) the Iowa judgment dated November 25, 1947, and (3) the federal district court of Iowa judgment dated October 6, 1937. Pages 4-5. The Appellees correctly state that the Iowa decree dated December 30, 1952 was "bottomed" upon these three prior judgments and decrees. The three decrees and judgments listed above, all entered prior to December 30, 1952, are not in the record in this case because they form the evidence and the chain of Appellants' title upon which the Iowa decree of December 30, 1952 was based. Appellees are arguing that the Nebraska court should be free to ex-

amine whether the three judgments and decrees listed above support the Iowa decree of December 30, 1952. Appellees would have the Appellants prove to the satisfaction of the Nebraska judicial system the validity of the December 30, 1952, Iowa decree on its merits. In short, Appellees would compel the Appellants to produce their evidence on the merits so the Nebraska judicial system might pass upon the legal rights of the Appellants for a second time which were violated under Art. 14, Sec. 1 of the U.S. Constitution when Nebraska courts took Appellants' land without process of law and equal protection of the law.

Elementary principles underlying the Full Faith and Credit Clause—principles long ago declared by this Court—preclude any serious contention that Appellants must litigate the merits of their claims a second time in Nebraska. Right or wrong, the Iowa decree is binding on Nebraska's courts. See *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940).

The decrees which Appellees claim are missing, are absent from the Record because they are irrelevant to any issue open to the Nebraska courts under the Federal Constitution. The Iowa decree of December 30, 1952, of course, was based upon evidence. This evidence consisted of the three afore-mentioned decrees, as well as other documentary evidence which this Court will find in the papers in this case on file in the Office of the Clerk of the Supreme Court of the United States. See Exhibits 1-1A, 2, 3, 4, 5, 10, 12 and 22. The legal effect of these exhibits, and the three decrees mentioned above, was adjudicated by the Harrison County Iowa decree of December 30, 1952, by a court of competent jurisdiction and the Appellants contend that the

Full Faith and Credit Clause forecloses the Nebraska courts from re-examining that issue for a second time.

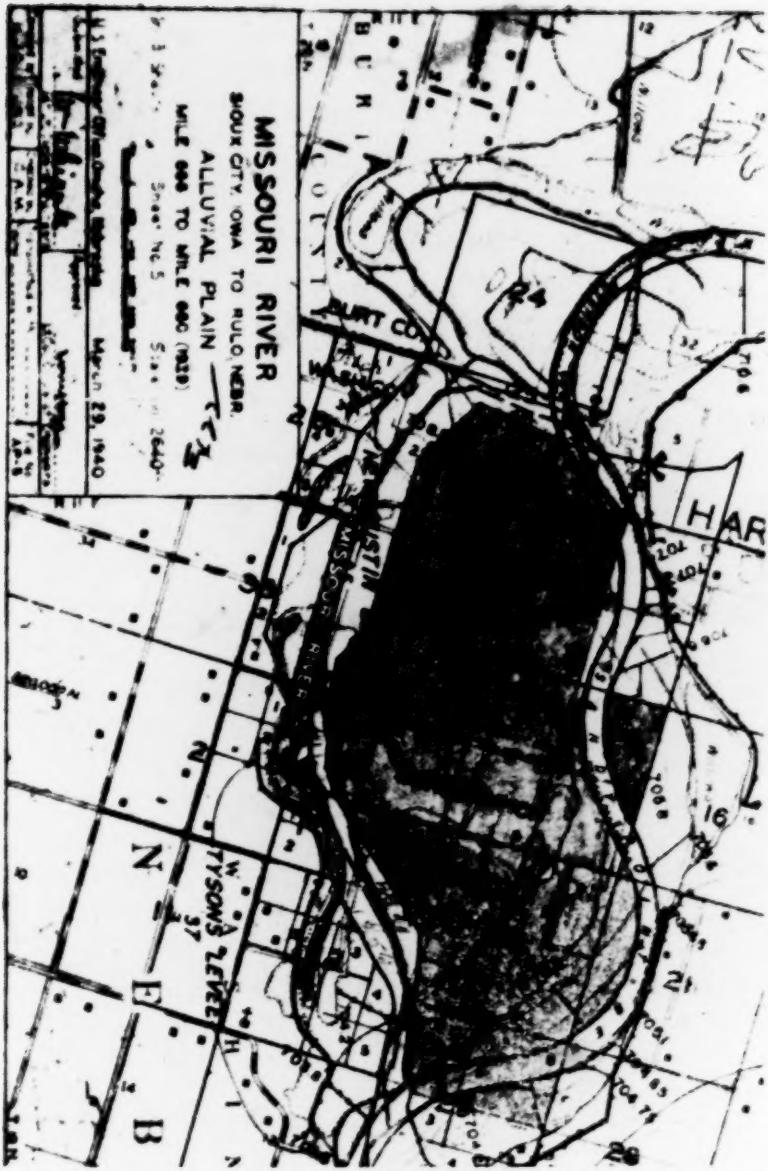
And this appeal is brought to your attention in order that you may give full faith and credit to this foreign judgment to which it is entitled under the Iowa-Nebraska Boundary Compact of 1943, and Article IV, Section 1 of the Constitution of the United States, in order that appellants' property rights, and right of possession may be protected in this case and nothing more — if this judgment is to be granted full faith and credit which the Iowa-Nebraska Compact agreement of 1943 is made mandatory. All of which the trial court in Washington County failed and refused to take judicial notice of, and permitted the appellees to collaterally attack the registered judgment and destroy its effectiveness forever — and take appellants' Iowa lands without due process of law — *and deny appellants equal protection of the laws of Iowa and Nebraska,* then the Iowa-Nebraska Boundary Compact of 1943 is meaningless and has no effect.

Counsel for the Appellants respectfully submit that jurisdiction should be noted, or, if the case is not within the class of appealable cases, that then certiorari should be granted.

Respectfully submitted,

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APPENDIX A



This map particularly identifies the area of appellants' lands in Sections 7, 8, 17, 18, 19, 20 and 29 in

Township 79 N. R. 45 West of 5th P. M. Harrison County, Iowa; said lands involved in this litigation were east of the Missouri River at the time the State of Iowa was admitted to the Union (1851); and shows stabilized channel of the Missouri River made by the U. S. Army Engineers' Corps, Omaha, Nebraska, from Peterson's Bend Cutoff to Sand Point Bend known as the stabilized channel of the Missouri River of 1940 and established under the Iowa-Nebraska Boundary Compact of 1943 in Harrison County Iowa.

We ask the Supreme Court to take judicial notice of this photo-engraved map showing alluvial plain sheet No. 5, by the U. S. Army Engineers' Corps, dated March 29, 1940, referring particularly to area, Exhibit No. 22 of Appellant's Bill of Exceptions, R. (Appellants' lands shown on map identified by Hugh Dillon, Nebraska State Surveyor, are geographically located in Harrison County, Iowa, contiguous to Nebraska and not within the territorial jurisdiction of any Nebraska courts).

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